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A TREATISE ON CODE PLEADING AND PRACTICE

ALSO CONTAINING

1900 FORMS

ADAPTED TO PRACTICE IN

CALIFORNIA, ALASKA, ARIZONA, IDAHO, MONTANA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, AND OTHER CODE STATES

BY

WILLIAM A. SUTHERLAND

OF THE CALIFORNIA BAR

IN FOUR VOLUMES

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CHAPTER LVIII.

NEW TRIAL IN GENERAL.

§ 1546. **In general.**—A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referee.[1] Motion for new trial is now a statutory remedy, and the mode pointed out by the statute must be pursued.[2] At common law, new trial is defined to be a "re-examination of an issue of fact before a court and jury, which had been tried at least once before the same court and jury."[3] There must be an issue of fact to be determined.[4] Where all the facts are agreed upon there is no issue of fact to be re-examined, and no ground for a new trial.[5] It is said "the origin of the practice of granting new trials is concealed in the night of time." In modern practice as well as in former times, new trials are granted for the purpose of more fully securing to the parties litigant complete justice. New trials are granted on the theory—1. That at the former trial there was some error of law committed by the court; or 2. That at the former trial some evidence material to the issue was not presented, the existence of which testimony being then unknown to the party making the application for a new trial, or at the time beyond his control, and which testimony is not cumulative in its character; or 3. Surprise, whereby the rights of the parties were materially affected at the former trial. In other words, new trials are granted for errors of the judge in matters of law, and errors of the jury in matters of fact.[6] And in any event, a new trial must be granted for some matter outside of the record.[7] The law presumes the verdict to be correct, unless the trial judge has determined that a witness on whose

1 Cal. Code Civ. Proc., § 656; Gregory v. Gregory, 102 Cal. 52, 36 Pac. 364; Comp. Laws Nev., par. 3290, § 194; Or. B. & C. Codes, § 173; Idaho Rev. Codes, § 4438; N. Dak. Code Civ. Proc., § 285; Ariz. Civ. Code, par. 194; Wash. Bal. Code, § 5070; Mont. Rev. Codes, § 6793; Wyo. Comp. Laws, § 306.

2 State v. Second Judicial Dist., 28 Mont. 123, 72 Pac. 412; Scott v. Ford (Or.), 97 Pac. 99.

3 Hilliard's New Trials, 1.

4 People v. Bank of San Luis Obispo, 152 Cal. 261, 92 Pac. 481; Younger v. Moore, 8 Cal. App. 237, 96 Pac. 1093, 155 Cal. 767.

5 Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364.

6 Rochell v. Phillips, Hempst. 23, Fed. Cas. No. 11974a.

7 Bowie v. State, 19 Ga. 1.

testimony the successful party's right is based is not worthy of belief,[8] and hence the party excepting must show clearly that the former decision was wrong. The fact that the stenographer has died, and the shorthand notes cannot be transcribed, does not warrant new trial.[9] Error must distinctly appear, and not be left shadowed in doubt. When, for instance, there are more issues than one submitted, one good and the rest bad, and a general finding, the presumption is that the jury disregarded the immaterial issue.[10] When a party desires to show that a judge ruled erroneously, it must be made to appear—1. What rulings were made; 2. That they were excepted to; 3. Wherein they were erroneous; 4. The materiality of the ruling; for unless the error had some influence in determining the verdict, no wrong is done, and a new trial should not be granted;[11] 5. An exception against the weight of evidence is not good unless it clearly appears that all the evidence is in the record.[12] All these are general propositions, which are, in most of the states, authoritatively settled by statute and the decisions of the courts. When a judgment and verdict are in accordance with the evidence, and there is no substantial conflict in it upon any material issue, and no error has intervened, the court has no right to grant a new trial, and if it does so, its order will be set aside as unauthorized.[13] When a suit has been regularly prosecuted to judgment, and substantial justice has been done, the parties are not entitled to invoke the interposition of the court for the purpose of having the cause retried and again determined at the expense of the public, and to the delay of other suitors, although both of the litigants join in the application.[14] Motion for new trial does not lie in proceedings to set apart a homestead, or exempt personal property, or for family allowance.[15]

It is useless to put parties to the additional trouble and expense of a new trial when it is clearly seen that after a protracted litigation the result must be the same;[16] nor will a new trial be

8 Mullen v. City of Butte, 37 Mont. 183, 95 Pac. 597.

9 Butts v. Anderson, 19 Okla. 367, 91 Pac. 906.

10 Hilliard's New Trials, 17.

11 Hilliard's New Trials, 18.

12 Hilliard's New Trials, 21.

13 Lawrence v. Burnham, 4 Nev. 361, 97 Am. Dec. 540.

14 Nichols v. Sixth Ave. R. R. Co., 10 Bosw. 260; Phelan v. Ruiz, 15 Cal. 90.

15 In re Heywood Estate, 154 Cal. 312, 97 Pac. 825.

16 Tohler v. Folsom, 1 Cal. 207; Smith v. Compton, 6 Cal. 26; Sunol v. Hepburn, 1 Cal. 254.

granted, as a general rule, to enable a party to recover nominal damages.[17] A new trial cannot be granted until there has been a determination of the issues of fact.[18] Where a new trial is ordered, and the order is based upon a decision determining the principles of law which govern the action, the new trial must be conducted in accordance with the principles thus determined.[19] A new trial cannot be prosecuted pending an appeal from an order granting the same.[20] Where judgment of the appellate court directs the court below what judgment to render, a new trial is not authorized.[21]

§ 1547. On court's own motion.—When the court vacates a verdict and orders a new trial, there must be a plain, palpable, and gross disregard of evidence, or of an instruction, of such character that it is plain the jury grossly disobeyed the judge.[22] The evidence should be so clear that the court would have been justified in directing a verdict contrary to the one rendered.[23]

§ 1548. Statutory new trial.—In Oklahoma, the defeated party in an action to recover real property may, by proper notice, at any time during the term at which judgment is rendered, have another trial as a matter of right.[24]

§ 1549. Power of court to grant.—The courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.[25] So in actions for the recovery of a penalty, although the verdict was in favor of the defendant. On a reversal of a judgment, in an action brought by a writ of error from a district court, the circuit court of another state may, if justice require it, award a *venire facias de*

17 Briggs v. Morse, 42 Conn. 258; McConihe v. New York etc. R. R. Co., 20 N. Y. 495, 75 Am. Dec. 420; Nolan v. Harris, 52 How. Pr. 409.

18 Putnam v. Crombie, 34 Barb. 232.

19 Leese v. Clark, 20 Cal. 387; Soule v. Ritter, 20 Cal. 522; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Heirs of Nieto v. Carpenter, 21 Cal. 455; Mitchell v. Davis, 23 Cal. 381; Moore v. Murdock, 26 Cal. 524; Lucas v. San Francisco, 28 Cal. 591; Estate of Pacheco, 29 Cal. 224; Mulford v. Estudillo, 32 Cal. 131; Pile v. Tubbs, 32 Cal. 332; Argenti v. Sawyer, 32 Cal. 414.

20 Ford v. Thompson, 19 Cal. 118.

21 Argenti v. City of San Francisco, 30 Cal. 458.

22 Cal. Code Civ. Proc., § 662; Eades v. Trowbridge, 143 Cal. 25, 76 Pac. 714.

23 Chicago etc. Ry. v. Groves, 20 Okla. 101, 93 Pac. 755.

24 Okla. (Wilson's) Rev. & Annot. Stats., § 4792; Hammer v. Rogers, 21 Okla. 367, 96 Pac. 611.

25 U. S. Rev. Stats. (1878), § 726.

novo, triable at the bar of such circuit court, according to the provisions of section 24 of the act of September 24, 1789.[26] If an order granting a new trial be reversed on the ground that it was prematurely made, the effect is to leave the motion for a new trial still pending in the court below to be regularly disposed of.[27] If the judge of a district or circuit court die, his successor has power to grant a new trial.[28] The power of a court of common law to grant new trial, and the grounds therefor, were practically unlimited.[29] The legislature has no power to grant a new trial or reopen a judgment in an action litigated between individuals.[30] The court has power to set aside report of referee and grant a new trial, on the ground that the evidence before the referee did not justify his decision,[31] or for any reason that would be sufficient to set aside the award of an arbitrator,[32] or the verdict of a jury.[33] The court may of its own motion, without the application of either party, vacate the verdict of a jury and grant a new trial, where the court is satisfied that the verdict was rendered under a misapprehension of the instructions or the influence of passion or prejudice.[34] And where the defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, although the defendant did not move for a new trial, and denies the power of the court to grant one.[35] The county court in California, prior to the present constitution, had power to grant a new trial. The appellate power of the supreme court over the county court could not be properly or efficiently exercised unless the power to grant a new trial existed in the county court.[36] But the county court had no power to grant a new trial in a special case, to contest an election under the statute.[37] Such proceedings are special

26 United States v. Sawyer, 1 Gall. 86, Fed. Cas. No. 16227. See, also, United States v. Wonson, 1 Gall. 5, Fed. Cas. No. 16750; United States v. Harding, 1 Wall. Jr., 127, Fed. Cas. No. 15301; United States v. Macomb, 5 McLean, 286, Fed. Cas. No. 15702; United States v. Taylor, 4 Cranch C. C. 338, Fed. Cas. No. 16436.

27 Thomas v. Sullivan, 11 Nev. 280.

28 Life etc. Ins. Co. of New York v. Wilson, 8 Pet. 291, 8 L. Ed. 949.

29 Spelling, New Trial and Appellate Practice, § 19.

30 People v. Frisbie, 26 Cal. 135.

31 Cappe v. Brizzolara, 19 Cal. 607.

32 Headley v. Reed, 2 Cal. 322.

33 McHenry v. Moore, 5 Cal. 90.

34 Cal. Code Civ. Proc., § 662. See Duff v. Fisher, 15 Cal. 375.

35 State v. Rover, 10 Nev. 388, 21 Am. Rep. 745.

36 Dickenson v. Van Horn, 9 Cal. 207.

37 Casgrave v. Howland, 24 Cal. 457. See Dorsey v. Barry, 24 Cal. 455.

cases.[38] A *mandamus* would not lie to compel a county judge to try a cause, on the ground that he has improperly dismissed the appeal taken from a justice's court.[39] On appeal from the justice's court to the superior court, on questions of law alone, if a new trial be ordered, it should take place in the superior court.[40] The superior court has jurisdiction to grant a new trial in the case of a nonsuit on the trial of an appeal to it from a justice's court.[41]

§ 1550. **Powers of equity.**—Courts of equity will not grant relief against judgments recovered at law, unless the party asking for relief was unable to avail himself of his defense in the action at law, or was prevented from doing so by fraud, accident, or mistake, without negligence on his part.[42] A bill of review for new trial must be filed within the time allowed for the prosecution of an appeal or writ of error.[43] The application must be made promptly; it is too late two years after the facts are discovered.[44] It is a well-established rule that equity never will grant a new trial of a matter which has been determined in a court of law; it being a matter over which the court of law has full jurisdiction.[45] But where injustice is done by a final judgment, without default of defendant therein in pleadings, or in producing evidence, equity will interfere. Or the chancellor may direct a new trial at law, on good grounds, and on sufficient reason being shown for failure to apply to the common-law judge.[46] So a new trial at law was decreed where the officers return had been altered. Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial; but it will only interfere in case of newly discovered evidence, surprise, or fraud, or where a party is deprived of the means of defense by circumstances beyond his control.[47] Chancery will not order a new trial at law in favor of a party who has neglected to apply

38 Keller v. Chapman, 34 Cal. 640.
39 People v. Weston, 28 Cal. 639.
40 People v. Freelon, 8 Cal. 517.
41 Massman v. Superior Court, 71 Cal. 582, 12 Pac. 685.
42 Quinn v. Wetherbee, 41 Cal. 247.
43 Allen v. Currey, 41 Cal. 318.
44 Neal v. Byers, 45 Cal. 234.
45 Green v. Robinson, 5 How. (Miss.) 80.
46 Hunt v. Boyier, 1 J. J. Marsh (24 Ky.), 484, 19 Am. Dec. 116.
47 Horn v. Queen, 4 Neb. 108.

at law, except under very special circumstances.[48] It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing.[49] A party cannot maintain an action in a court of equity to obtain a new trial in a court of law without showing that he had no opportunity to move for a new trial in the law court, by reason of mistake, accident, or surprise, unaccompanied by any fault or negligence on his part;[50] or where no circumstances of fraud are shown;[51] or unless the judgment was obtained through fraud, accident, or mistake, unconnected with negligence or inattention on the part of the judgment debtor.[52]

A purchaser of land during pendency of suit against the grantor for its recovery, with notice of suit pending, who neglects to defend it till judgment is rendered, and then neglects to move for a new trial, cannot obtain a new trial in a court of equity.[53] An application made in a court of equity for a new trial, on the ground that the defendant was defaulted, and thereby prevented from maintaining a claim in set-off, will be refused, if it does not appear that he is in danger of losing his claim.[54] A court of equity should not grant a new trial at law upon the ground that a party was deprived, without fault on his part, of his remedy, by writ of error to correct erroneous rulings on the first trial, when no error in the judgment at law appears on the record.[55] Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity to enjoin the judgment rendered.[56] In a suit in equity, if the issues are submitted to a jury and a general verdict returned, which the court afterwards sets aside on motion for a new trial, it is unnecessary for the court to grant a new trial; the court may, upon the testimony already given, and such further testimony as may be taken, in its discretion, determine the issues of fact and give final judgment.[57]

48 Hill v. McNeill, 8 Port. (Ala.), 432; Gales v. Shipp, 2 Bibb (5 Ky.), 241; Patterson v. Matthews, 3 Bibb (6 Ky.), 80.

49 Tice v. School District, 17 Fed. 283, 5 McCrary, 360.

50 Mastick v. Thorp, 29 Cal. 444; Faulkner v. Harwood, 6 Rand. (Va.) 125. But see Cummins v. Kennedy, 4 J. J. Marsh. (27 Ky.) 642; Harrison v. Harrison, 1 Litt. (11 Ky.) 137.

51 Borland v. Thornton, 12 Cal. 441; Boston v. Haynes, 33 Cal. 31; Land v. Elliott, 1 Smedes & M. (9 Miss.) 608; Herring v. Winans, 1 Smedes & M. Ch. 466.

52 Day v. Welles, 31 Conn. 344.

53 Mastick v. Thorp, 29 Cal. 444.

54 Clute v. Ewing, 21 Tex. 679.

55 Parker v. Horne, 38 Miss. 215.

56 Collins v. Butler, 14 Cal. 223; Borland v. Thornton, 12 Cal. 441; Mastick v. Thorp, 29 Cal. 444.

57 Wingate v. Ferris, 50 Cal. 105.

§ 1551. Granting motion discretionary.—Motions for new trial are addressed to the sound discretion of the court, and are granted or denied not as matter of strict right, but as the substantial justice of the case may appear to require.[58] The discretion granted to a trial court to set aside a verdict and grant a new trial is not an arbitrary one, and does not exist unless authorized by law or established by precedent.[59] The allowance of a new trial is in the discretion of the trial court, and should only be reversed for an abuse thereof.[60] Under the Wyoming statute,[61] a motion for a new trial which presents questions of law is not addressed to the discretion of the court.[62] And where a new trial has been granted it is presumed the discretion was properly exercised; and the burden of showing that it was not devolves upon the party appealing from the order.[63] A court is not bound to grant a new trial, although both parties

58 Drake v. Palmer, 2 Cal. 177; affirmed in Hastings v. Steamer Uncle Sam, 10 Cal. 341; Palmer v. Stewart, 2 Cal. 353; Speck v. Hoyt, 3 Cal. 413; Peters v. Foss, 16 Cal. 357; Smith v. Richmond, 15 Cal. 501; Nooney v. Mahoney, 30 Cal. 226; O'Brien v. Brady, 23 Cal. 243; Quinn v. Kenyon, 22 Cal. 82; Lestrade v. Barth, 17 Cal. 286; Hall v. Bark Emily Banning, 33 Cal. 525; Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962; Clayton v. Yarrington, 33 Barb. 145; State v. Anderson, 19 Mo. 241; McLanahan v. Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98; Calbreath v. Gracy, 1 Wash. C. C. 198; Fed. Cas. No. 2295; Denniston v. McKeen, 2 McLean, 253, Fed. Cas. No. 3803; United States v. Martin, 2 McLean, 256, Fed. Cas. No. 15731; Benedict v. Davis, 2 McLean 347, Fed. Cas. No. 1293; Lloyd v. Scott, 4 Cranch C. C. 206, Fed. Cas. No. 8434; Shepherd v. Brenton, 15 Iowa, 84; Whitney v. Blunt, 15 Iowa, 283; McNair v. McComber, 15 Iowa, 368; McKay v. Thorington, 15 Iowa, 25; Head v. Langworthy, 15 Iowa, 235; House v. Wright, 22 Ind. 383; Magee v. North Pacific R. R. Co., 78 Cal. 430, 12 Am. St. Rep. 69, 21 Pac. 114; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Wiedekind v. Tuolumne etc. Water Co., 83 Cal. 198, 23 Pac. 311; Hawes v. Clark, 84 Cal. 272, 24 Pac. 116; People v. Merkle, 89 Cal. 82, 26 Pac. 642; Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Groppengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036; Edwards v. Carson Water Co., 21 Nev. 469, 34 Pac. 381; Alt v. Chicago etc. R. R. Co., 5 S. Dak. 20, 57 N. W. 1126; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132. See, also, Forrest v. Forrest, 25 N. Y. 501; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848; Clifford v. Denver etc. R. R. Co., 12 Colo. 125, 20 Pac. 333; Cook v. Doud, 14 Colo. 483, 23 Pac. 906; City of Denver v. Jacobson, 17 Colo. 497, 30 Pac. 246.

59 Woodmen of the World v. Thiebaud, 65 Kan. 332, 69 Pac. 348.

60 Marion Mfg. Co. v. Bowers, 71 Kan. 260, 1905, 80 Pac. 565.

61 Comp. Laws, § 306.

62 United States v. Trabing, 3 Wyo. 144, 6 Pac. 721.

63 Hobler v. Cole, 49 Cal. 250. That it is not a matter of mere discretion in all cases, see Anderson v. Rome etc. R. R. Co., 54 N. Y. 334; Sacramento etc. M. Co. v. Showers, 6 Nev. 291.

desire it.[64] Where a new trial was granted on the ground of irregularity in the presence of the court, the appellate court will not review the question as to whether the court below was mistaken on the question of fact involved.[65] A new trial should not be granted unless the evidence strongly preponderates against the verdict;[66] and the court may consider newly discovered evidence besides the pertinent evidence on the original trial.[67] Or where the question of law was adverse to the verdict.[68] Or where errors intervened in the trial of a cause.[69] Or where the judgment is erroneous, by reason of a wrong construction given to the description of land in a deed in evidence.[70] So where on the trial it was not fully disclosed by the evidence where the initial point was located in the boundary of land, a new trial was ordered for a more full disclosure.[71] Or where the jury, without particular instructions, returned a verdict payable in gold coin, though there was no evidence that the defendant promised in writing to pay in gold coin, a new trial was granted.[72] But a new trial will not be granted to allow a party to contradict admissions on a former trial.[73] In Indiana, it appears, in a civil case only two new trials can be granted to the same party in the cause, upon any grounds whatever.[74] The court will not entertain a second application for a new trial by the same party in the same suit, unless it appears or is shown that the party did not know, or could not have known, the grounds upon which the second application rests at the time the former application was submitted.[75] In New York, in actions to recover possession of lands, the grant of a third trial is in the discretion of the court.[76] In Colorado and Oklahoma, any party against whom judgment is rendered in an action to recover possession of real

64 Phelan v. Ruiz, 16 Cal. 90; Aiken v. Bruen, 21 Ind. 137; Nichols v. Sixth Ave. R. R. Co., 10 Bosw. 260.

65 Thompson v. Thornton, 47 Cal. 76.

66 Treadway v Wilder, 9 Nev. 67; Williams v. State, 9 Mo. 270; Robbins v. Alton etc. Ins. Co., 12 Mo. 380; Williams v. Buker, 49 Me. 427.

67 Chicago etc. Ry. Co. v. Mosher, 76 Kan. 599, 92 Pac. 554.

68 Speck v. Hoyt, 3 Cal. 413.

69 Hastings v. Steamer Uncle Sam, 10 Cal. 341.

70 Hicks v. Coleman, 25 Cal. 145, 85 Am. Dec. 103; Piercy v. Crandall, 34 Cal. 334.

71 Piercy v. Crandall, 34 Cal. 334.

72 Howard v. Roeben, 33 Cal. 339.

73 Vandall v. South S. F. Dock Co., 40 Cal. 92.

74 Roberts v. Robeson, 22 Ind. 456.

75 Hayes v. Kenyon, 7 R. I. 531.

76 Wright v. Milbank, 9 Bosw. 672.

property may have one new trial "as of right, without showing cause," upon complying with certain terms.[77]

§ 1552. Court may impose terms.—Where a new trial is asked as a matter of favor, or rests in the discretion of the court, a condition may be imposed upon granting it; but where a party asks it as a matter of right, because some legal error was committed, the appellate court has no discretion to grant or withhold it, but, finding error, is bound to reverse the judgment and grant a new trial, and cannot impose a condition thereon.[78] If the findings are not sustained by the evidence, in a question of damages, the court may require the plaintiff to remit the damages or submit to a new trial.[79] If a verdict for the plaintiff is for an excessive amount, the defendant is entitled to have it reduced or a new trial granted without the imposition of any terms upon him.[80] After the court grants a new trial on terms, as a rule the court above will not interfere in these matters.[81] The terms upon granting new trials are peculiarly within the discretion of the court, with the exercise of which the appellate court will not interfere, except on a clear showing of abuse or grossly unreasonable terms.[82] It seems to be the rule in England, if a new trial is allowed on a question of merits, that costs will be allowed, but otherwise, if allowed for irregularity.[83] The court, in its discretion, may make payment of costs the condition upon which to grant a new trial.[84] So if payment of costs be made a condition precedent, and it is not done in the time prescribed, the judgment remains in force.[85] An order granting a new trial

77 Snider v. Rinehart, 18 Colo. 18, 31 Pac. 716; Okla. (Wilson's) Rev. & Annot. Stats., § 4792; Hammer v. Rogers, 21 Okla. 367, 96 Pac. 611.

78 Anderson v. Rome etc. R. R. Co., 54 N. Y. 334. See Eaton v. Jones, 107 Cal. 487, 40 Pac. 798.

79 Carpentier v. Gardner, 29 Cal. 160; Rigney v. Tacoma etc. Water Co., 9 Wash. 245, 37 Pac. 297; Davis v. Southern Pacific Co., 98 Cal. 13, 32 Pac. 646. See Patterson v. Ely, 19 Cal. 28; Benedict v. Cozzens, 4 Cal. 382.

80 Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880.

81 Hilliard's New Trials, 53.

82 Rice v. Gashirie, 13 Cal. 54; Battelle v. Connor, 6 Cal. 140. As to reduction of verdict, see Harrison v. Peabody, 34 Cal. 179; Chapin v. Bourne, 8 Cal. 296; Davis v. Southern Pacific Co., 98 Cal. 13, 32 Pac. 646. On payment of costs, see Tyson v. Wells, 1 Cal. 378; Overing v. Russell, 28 How. Pr. 151. See, also, East River Bank v. Hoyt, 22 How. Pr. 478; North v. Sergeant, 33 Barb. 350; Zimmerman v. Marchland, 23 Ind. 474.

83 Hilliard's New Trials, 53.

84 Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194. See Brown v. Cline, 109 Cal. 156, 41 Pac. 862; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413.

85 State v. Jacobs, 6 Tex. 99.

on condition that defendant pay the costs requires payment of costs on demand, and the refusal to pay such costs converts the order into a refusal of a new trial, finally disposes of the motion, and leaves the judgment in full force. Also, a subsequent order making the conditional grant of a new trial an absolute order is void.[86] Where all but three dollars and twenty-five cents of the costs were paid, and no objection raised until ten years afterward, it must be considered a waiver of any such objection.[87] Where a party complies with the terms imposed and avails himself of the order, he cannot afterwards question its correctness.[88]

[86] Holtum v. Greif, 144 Cal. 521, 78 Pac. 11.

[87] Green v. Brown, 11 N. Mex. (658), 72 Pac. 17.

[88] Battelle v. Connor, 6 Cal. 140.

CHAPTER LIX.

PROCEEDINGS ON MOTION FOR NEW TRIAL.

§ 1553. Steps requisite.—There are three distinct steps recognized in a proceeding to obtain a new trial, for the taking of which, except the last, a particular period of time is allowed: 1. A notice of intention to move for a new trial; 2. Filing and serving statements or affidavits; and 3. The motion for a new trial. An order extending the time for taking either of these steps should express with precision the object to be attained.[1] The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute.[2]

§ 1554. Application, how made.—When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the statutory notice, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case.[3] And the notice of intention must designate the grounds upon which the motion will be made, and whether it will be made upon affidavits, or the minutes of the court, or a bill of exceptions, or a statement of the case.[4] A colloquy between the attorneys and the court on return of the verdict, seeking to have the court grant a new trial on its own motion, is not a formal motion for a new trial.[5] A protest, made by a defendant who refused to take part in a trial, before judgment is entered on a verdict for plaintiff, said protest being against the signing or entering of judgment, is in effect an application for a new trial.[6] If the motion be made

1 Jenkins v. Frink, 27 Cal. 337.

2 Burton v. Todd, 68 Cal. 485, 9 Pac. 663; Kelly v. Larkin, 47 Cal. 58.

3 Cal. Code Civ. Proc., § 658. See form No. 474, § 1650, post.

4 Cal. Code Civ. Proc., § 659; Alaska Codes, pt. 2, ch. 17, §§ 164, 172; Ariz. Civ. Code, par. 1473; Idaho Rev. Codes, § 4441; Mont. Rev. Codes, § 6796; Nev. Comp. Laws, § 3292; N. Mex. Comp. Laws, § 2685; subds. 97, 102; N. Dak. Code Civ. Proc., § 5474; Or. B. & C. Codes, §§ 175, 177; S. Dak. Code Civ. Proc., § 303; Utah Rev. Stats., § 4953; Wash. Bal. Codes, § 5075; Wyo. Rev. Stats., § 3749; Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027.

5 Occidental Real Estate Co. v. Gantner, 7 Cal. App. 727, 95 Pac. 1042.

6 McInnes v. Sutton, 35 Wash. 384, 77 Pac. 736.

on the minutes of the court, and the ground is insufficiency of evidence or errors of law, the notice must specify the particulars wherein the evidence is insufficient, or the particular errors of law, or the motion must be denied.[7]

§ 1555. **Notice of intention, time within which it must be given.**—The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court or referee, if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention.[8] Where notice of the decision is necessary, the time within which notice of intention to move for new trial must be served does not begin to run until after written notice of the decision has been given.[9] And where it does not appear that any written notice of the decision had been given, the statement cannot be objected to on the ground that it was not filed in time.[10] If notice is not served and filed within the time, the motion is properly denied; an admission of service on a certain day is not a waiver of the objection that service on that day is too late.[11] Where a defendant has waived notice of decision by getting a stay of proceedings, the plaintiff may rely on such waiver and have a dismissal of a motion for new trial not filed within time, and the fact that a co-defendant gave to that defendant notice of the decision at a later date does not matter.[12] The time begins to run from date of notice of decision of the court of equity, and not from the date of the special findings of the jury.[13]

§ 1556. **Notice how given.**—Notice of intention must be given in writing,[14] and must be served upon the attorney of record

7 Cal. Code Civ. Proc., § 659, subd. 4.

8 Cal. Code Civ. Proc., § 659. See, as to time for notice, Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898; Waddingham v. Tubbs, 95 Cal. 249, 30 Pac. 527; Robinson v. Benson, 19 Nev. 331, 10 Pac. 441.

9 Roussin v. Stewart, 33 Cal. 208; Sawyer v. San Francisco, 50 Cal. 370; People v. Center, 61 Cal. 191.

10 Burnett v. Stearns, 33 Cal. 468.

11 Clark v. Gridley, 49 Cal. 108; Coveny v. Hale, 49 Cal. 555; Towdy v. Ellis, 22 Cal. 650. See Biagi v. Howes, 66 Cal. 469, 6 Pac. 100; Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Waddingham v. Tubbs, 95 Cal. 249, 30 Pac. 527; Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789; Gray v. Winder, 77 Cal. 525, 20 Pac. 47.

12 Gardner v. Stare, 135 Cal. 118, 67 Pac. 5.

13 Spencer v. Hersam, 31 Mont. 120, 77 Pac. 418.

14 Cal. Code Civ. Proc., § 1010; Bear River etc. Co. v. Boles, No. 1, 24 Cal. 356; Killip v. Empire Mill Co., 2 Nev. 34.

of the party,[15] unless such service is waived,[16] and must be given by the attorney of record of the party giving it.[17] The parties to proceedings for new trial are determined by the notice of intention to move therefor.[18] The notice is premature and ineffectual if given before the findings are signed.[19] But the notice may be given before the receipt of the notice of the decision, and when so given is in time.[20] The time may be extended by stipulation of counsel.[21] Where the notice is not filed with the clerk within the time allowed by law, the motion for a new trial is properly denied, although the notice has been served upon the adverse party within due time.[22] A notice of intention to vacate the judgment is not a notice of intention to move for a new trial.[23] Where the defeated party gives notice of his intention to move for a new trial without waiting for the service upon him of a notice of the decision, he thereby waives such notice.[24] Under Utah practice, the notice of intention to move for a new trial stands for the formal motion, and after the notice has been given the motion may be called up to be heard without a written motion having been made.[25]

§ 1557. **Time for giving notice—Continued.**—A settlement of a statement for a new trial made before the entry of judgment is premature, and the court can be compelled by *mandamus* to settle another statement.[26] Under a code provision that application for a new trial must be made at the same term and within

15 Cal. Code Civ. Proc., § 1015.

16 Frost v. Meetz, 52 Cal. 664.

17 Prescott v. Salthouse, 53 Cal. 221.

18 Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225.

19 Dominguez v. Mascotti, 74 Cal. 269, 15 Pac. 773; James v. Superior Court, 78 Cal. 107, 20 Pac. 241; Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615.

20 Symons v. Bunnell, 80 Cal. 330, 22 Pac. 193. See Carpenter v. Hewel, 67 Cal. 589, 8 Pac. 314. As to extension of time in which to give notice of intention, see Burton v. Todd, 68 Cal. 485, 9 Pac. 663, 27 Pac. 758; Brichman v. Ross, 67 Cal. 601, 8 Pac. 316.

21 Simpson v. Budd, 91 Cal. 488. As to waiver of objection that notice was not in time, see Schieffery v. Tapia, 68 Cal. 184, 8 Pac. 878.

22 Sutton v. Symons, 100 Cal. 576, 35 Pac. 158.

23 Little v. Jacks, 67 Cal. 165, 7 Pac. 449.

24 Thorne v. Finn, 69 Cal. 251, 10 Pac. 414. But see Burlock v. Shupe, 5 Utah, 428, 17 Pac. 19.

25 East v. Mooney, 7 Utah, 414, 27 Pac. 4; Needham v. City, 7 Utah, 319, 26 Pac. 920. See Wastl v. Montana etc. Ry. Co., 13 Mont. 500, 34 Pac. 844; People v. Ah Sam, 41 Cal. 645.

26 Fountain Water Co. v. Dougherty, 134 Cal. 376, 66 Pac. 316; Power & Bro. v. Turner, 37 Mont. 521, 97 Pac. 950.

three days after verdict, unless unavoidably prevented, an application filed after that time, and not showing cause for not filing in time, will be dismissed.[27] A motion for a new trial made while the jury is out making one of its findings more specific is not made prematurely, especially where the clerk was instructed to withhold its filing until after the filing of the verdict.[28] Special findings of a jury in an equitable proceeding are not effective until adopted by the court, and time for filing a motion for a new trial should be computed from that time.[29] Because a judgment is prematurely entered, the last day of the term and the day the findings are filed, it does not deprive a party of his right to file a motion for a new trial.[30]

One intending to move for a new trial may wait for a notice in writing of the decision from the adverse party before giving notice of his intention to move.[31] The notice is considered as filed on the day it is left with the clerk.[32]

§ 1558. Notice generally.—The notice must designate the grounds upon which the motion will be made, or it is insufficient, and the defect is not cured by designating the grounds in the statement.[33] If the notice distinctly and unmistakably gives the information that a new trial is asked for, it is sufficient. The notice may state conjunctively two or more, or all, of the grounds given by statute. But to put the notice in the alternative, leaving it uncertain which of several grounds appellant relies on, would be objectionable.[34] A motion for new trial on grounds

27 Hopkins v. Watson, 67 Kan. 858, 74 Pac. 233.

28 Atchison etc. Ry. Co. v. Davis, 70 Kan. 578, 79 Pac. 130.

29 Jenkins v. Kirtley, 70 Kan. 801, 79 Pac. 671.

30 Jennings v. Frazier, 46 Or. 470, 80 Pac. 1011.

31 Everett v. Jones, 32 Utah, 489, 91 Pac. 360.

32 Commercial Nat. Bank of Ogden v. Schlitz, 6 Cal. App. 174, 91 Pac. 750.

33 Street v. Lemon M. & M. Co., 9 Nev. 251. As to sufficiency of notice of intention, see Hughes v. Alsip, 112 Cal. 587, 44 Pac. 1027; Cook v. Sudden, 94 Cal. 443, 29 Pac. 949; Mazkewitz v. Pimentel, 83 Cal. 450, 23 Pac. 527; Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22; Packer v. Doray, 98 Cal. 315, 33 Pac. 118; Hill v. Beatty, 61 Cal. 292; O'Connell v. Main etc. Hotel Co., 90 Cal. 515, 27 Pac. 373; Hibernia etc. Soc. v. Moore, 68 Cal. 156, 8 Pac. 824; Heinlen v. Heilbron, 71 Cal. 557, 12 Pac. 673; Dawes v. Powers, 5 Mont. 59, 1 Pac. 421; State v. Fry, 10 Mont. 407, 25 Pac. 1055; Hall v. Harris, 1 S. Dak. 279, 36 Am. St. Rep. 730, 46 N. W. 931; National Cash Register Co. v. Pfister, 5 S. Dak. 143, 58 N. W. 270; Stevens v. Higginbotham, 6 Utah, 215, 21 Pac. 946; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957.

34 Gamer v. Glenn, 8 Mont. 371, 20 Pac. 654.

of newly discovered evidence need not be verified. It is sufficient if it is sustained by an affidavit presented at the hearing of the motion.[35] A notice stating as a ground of the motion the insufficiency of the evidence to sustain the "judgment," or that the "judgment" is against law, is improper; for the motion is not directed at the judgment, but at the verdict or other decision of fact.[36] The notice of intention must be served on the adverse party.[37] Notice of intention, filed within the statutory time, gives the court jurisdiction so far as to be able to dispose properly of the motion for new trial, even if the term is adjourned; but if no notice is filed, then the court loses jurisdiction of the case. The court cannot order notice filed *nunc pro tunc*.[38] The ten days do not begin to run till written notice of the rendering of the decision has been served.[39] A party cannot abandon his first notice and file a second.[40] Failure to file and serve notice of intention on the opposite party within the time prescribed is a waiver of right to move for a new trial.[41]

§ 1559. **Notice as a stay of proceedings.**—A motion for a new trial will not suspend an injunction.[42] If the plaintiff is entitled to an injunction, and obtains one before the trial, he is entitled to retain it upon the cause being remanded for a new trial.[43] Nor, after court has filed its findings and sent the case to a referee, will it stay the proceedings pending before said referee.[44] A demand in open court, at the close of the trial in an action to recover real property, for another trial, is a sufficient demand of new trial by notice on the journal, and the clerk should immediately enter such request on the journal, and the court should vacate the judgment and continue the cause to the next term.[45]

§ 1560. **Notice must be given or waived.**—Notice must be either given or waived to give jurisdiction.[46] Notice of the final

35 St. Louis etc. R. Co. v. Gaston, 67 Kan. 217, 72 Pac. 777.

36 Martin v. Matfield, 49 Cal. 42.

37 Cal Code Civ. Proc., § 659; Johnson v. Phenix Ins. Co., 152 Cal. 196, 92 Pac. 182.

38 Killip v. Empire Mill Co., 2 Nev. 34.

39 Roussin v. Stewart, 33 Cal. 208; Carpentier v. Thurston, 30 Cal. 123.

40 Le Roy v. Rassette, 32 Cal. 171.

41 Bear River etc. Co. v. Boles, No. 1, 24 Cal. 354; Caney v. Silverthorne, 9 Cal. 67; Ellsasser v. Hunter, 26 Cal. 279.

42 Ortman v. Dixon, 9 Cal. 23.

43 Hess v. Winder, 34 Cal. 270.

44 Crowther v. Rowlandson, 27 Cal. 376.

45 Kell r v. Hawk, 13 Okla. 261, 74 Pac. 106.

46 Bear River etc. Co. v. Boles, No. 1, 24 Cal. 354. No motion for a new trial can be entertained where

decision of the court may be waived, and time computed from such waiver.[47] And unless the record contains evidence of the service of the notice, or it clearly appears that service of the notice was waived, the court has no jurisdiction of the motion.[48] If no notice is given of an intention to move for a new trial, a statement made and filed and agreed to by the parties, or settled by the judge, cannot be made the foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal.[49] But where the attorneys stipulate in writing, appended to the statement, that "the foregoing statement is a true and correct statement on motion for a new trial; that upon said statement the said court did, on, etc., overrule the plaintiffs' motion for a new trial and refuse to grant the plaintiffs a new trial, to which plaintiffs then and there excepted; and further, that the judgment-roll, etc., and the aforesaid statement on motion for a new trial and this stipulation, is a true and correct transcript on appeal, and may be used without further certificate," etc.—a notice may be presumed to have been given, though none appears on the record.[50]

§ **1561. Time, extension of.**—Time to give notice of intention may be extended thirty days.[51] An order extending the time to prepare and file a motion extends the time to give notice of motion for a new trial; and an order extending the time for more than the period allowed by statute is good for the statutory extension.[52] The Washington courts may enlarge the time within which to move for a new trial,[53] but their refusal to grant more time will not be disturbed in absence of abuse.[54] Extension of time for filing statement does not extend the time for filing notice of motion for new trial.[55]

no notice of intention was given, as prescribed by the code. Matter of Philbrook, 108 Cal. 14, 40 Pac. 1061. See Gould v. Duluth etc. Elevator Co., 2 N. Dak. 216, 50 N. W. 969.

47 Gardner v. Stare, 135 Cal. 118, 67 Pac. 5.

48 Calderwood v. Brooks, 28 Cal. 151.

49 Flateau v. Lubeck, 24 Cal. 364.

50 Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178. See Hart v. Kimball, 72 Cal. 283, 13 Pac. 852; Rutherford v. Talent, 6 Mont. 112, 9 Pac. 886.

51 Cal. Code Civ. Proc., § 1054; Harper v. Minor, 27 Cal. 107.

52 Cottle v. Leitch, 43 Cal. 320.

53 Wash. Sess. Laws, 1897, p. 13, § 1; Sess. Laws, 1893, p. 414, § 24; Leavenworth v. Billings, 26 Wash. 1, 66 Pac. 107.

54 Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477.

55 McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574.

§ 1562. **Joint application.**—A joint application for new trial, in which parties who disclaim are included, will be sustained as to those who do not disclaim, if the grounds are sufficient.[56]

§ 1563. **Waiver of notice.**—The filing of a counter-statement is a waiver of objection to a want of notice of intention.[57] But if the record does not show that the party resisting application for a new trial proposed amendments to the statement, or participated in its settlement, waiver of service will not be presumed.[58]

§ 1564. **Motion on affidavits.**—When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions in the statutory notice of intention, it must be made upon affidavits.[59] When a new trial is granted upon a particular ground, there must be some legal evidence that such cause for a new trial exists, and the ground must be a legal ground for granting a new trial.[60] When the motion is made on the grounds of irregularity in the proceedings of the jury, and misconduct of the jury, it must be upon affidavits.[61] If the motion is to be made upon affidavits, the moving party must within ten days after serving the notice, or such further time as the court in which the action is pending or a judge thereof may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party.[62] The time within which counter-affidavits may be filed is not jurisdictional, but is only a rule of procedure subject to the equitable control of the court.[63] The court may allow them to be filed after the time limited by the statute, under a showing that they had been prepared and served, and that the filing was omitted through oversight or mistake.[64]

An affidavit on a motion for a new trial for irregularities in the proceedings of the court cannot be considered when made

56 Equitable Mortg. Co. v. Gray, 68 Kan. 100, 74 Pac. 614.

57 Williams v. Gregory, 9 Cal. 76.

58 Calderwood v. Brooks, 28 Cal. 151; Cereghino v. Cereghino, 4 Utah, 100, 6 Pac. 523; People v. Carter, 64 Cal. 561. As to waiver of irregularity in the notice of intention, see Christy v. Spring Valley Water Works, 68 Cal. 73, 8 Pac. 849; Savings etc. Soc. v. Moore, 68 Cal. 156, 8 Pac. 824.

59 Cal. Code Civ. Proc., § 658. See form No. 474, § 1650, post.

60 Braithwaite v. Aiken, 2 N. Dak. 57, 49 N. W. 419.

61 Benjamin v. Stewart, 61 Cal. 605.

62 Cal. Code Civ. Proc., § 659, subd. 1.

63 Smith v. Whittier, 95 Cal. 279, 30 Pac. 529.

64 Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

merely on information and belief.[65] Affidavits of jurors in an action where a new trial is demanded on grounds of a verdict being reached by chance must be sufficient to show that the jurors previously agreed to abide by the results of a determination by chance.[66]

An affidavit of a juror who did not join in the verdict, as to the manner in which the amount of the verdict was determined, is properly refused consideration, since the alleged misconduct inhered in the verdict, which could not be impeached by a juror.[67]

§ 1565. Application, grounds of.—Application for new trial may be made because of irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which either party was prevented from having a fair trial.[68] The irregularity mentioned must be distinguished from errors of law, as the motion, if made on the latter ground, is not based on affidavit.[69] Personal misconduct of the judge having a case under advisement may be an "irregularity in the proceedings of the court" for which a new trial may be granted.[70]

§ 1566. Abuse of discretion.—Under certain circumstances, it has been held an abuse of discretion for the court to refuse to allow the defendant permission to verify his answer, and grant a motion to strike it out, when the cause came on for trial, no objection having been made to it before that time.[71] But an enlarged discretion is given to lower courts in the conduct of their business, with which an appellate court will not interfere, unless it affirmatively appear that injustice has been done.[72]

§ 1567. Adverse party, misconduct of.—A motion for a new trial for misconduct of the opposite party must be accompanied by an affidavit of the facts relied on.[73] Where the defendant, sheriff of the county, mingled with and conversed with jurors while they were deliberating upon their verdict, and in the charge

65 Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

66 Archibald v. Kolitz, 26 Utah, 226, 72 Pac. 935; Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 Pac. 514.

67 Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

68 Cal. Code Civ. Proc., § 657, subd. 1.

69 See Wilcoxson v. Burton, 27 Cal. 232, 238, 87 Am. Dec. 66.

70 Cal. Code Civ. Proc., § 657; Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

71 Lattimer v. Ryan, 20 Cal. 628

72 Broadus v. Nelson, 16 Cal. 79.

73 Paquetel v. Gauche, 17 La. Ann. 63.

of a sworn bailiff, no reasonable excuse appearing therefor, such defendant is guilty of such irregularity as to justify the court in granting a new trial.[74] Where it was necessary for the jury to view the premises, the fact that the judge announced that plaintiff had carriages ready to convey the jury, and these carriages were hired from the barn of one of the jurors, of whom plaintiff was a regular customer, is not sufficient to require setting aside a verdict for the plaintiff.[75]

If it appears the prevailing party has attempted to tamper with the jury, a verdict in his favor should be set aside without showing that such attempt has influenced the jury, and even so if it was an innocent act.[76] The crying of plaintiff in presence of the jury during argument is not ordinarily misconduct.[77] Where counsel is allowed to read to the jury as a part of his opening statement, against the objection of the opposite party, matter which is not competent as evidence, and which is afterwards excluded when offered as evidence, it is an irregularity entitling the party injured to a new trial.[78] So, also, where counsel is permitted to use abusive language towards a prisoner and insinuate that he did not dare stand a fair and impartial trial, or refers to plaintiff's refusing to allow his physician to testify as to privileged communications, it creates a prejudice against the prisoner and entitles him to a new trial.[79] Improper conduct on the part of the prevailing party towards a witness, as by threats, persuasions, etc., is a ground for new trial.[80] Or the production of an interested witness, known to be such, without disclosing the circumstance.[81] If defendant, without objection, permits plaintiff's counsel to draw inferences which he deems unfair and unjust, or to indulge in argument calculated to improperly influence, prejudice, or mislead the jury, it is too late after verdict to rely upon it as ground for a new trial.[82] Also where plaintiff had erred in practice, through erroneous

74 Peterson v. Siglinger, 3 S. Dak. 255, 52 N. W. 1062. See, also, People v. Myers, 70 Cal. 582, 12 Pac. 719.

75 Missouri Pacific Ry. Co. v. Bowman, 68 Kan. 489, 75 Pac. 482.

76 Id.

77 Connell v. Seattle etc. Ry. Co., 47 Wash. 510, 92 Pac. 377.

78 Scripps v. Reilly, 35 Mich. 371, 24 Am. Rep. 575; Lindsay v. Pettigrew, 3 S. Dak. 199, 52 N. W. 873.

79 State v. Smith, 75 N. C. 306; Kiehlhoefer v. Washington W. P. Co., 49 Wash. 646, 96 Pac. 220.

80 Owen v. Atkinson, 7 Mod. Cas. 156.

81 Niles v. Brackett, 15 Mass. 378.

82 Ames v. Potter, 7 R. I. 265.

advice of counsel, a new trial will be ordered;[83] but this does not seem to be a good reason for a new trial. The failure of an attorney to prepare for the trial in consequence of a conversation had with the adverse attorney, by which he is misled into the belief that the trial would be postponed, is excusable neglect warranting a new trial.[84] Disorderly conduct on part of spectators, calculated to influence the jury, or which prevents the jury from hearing the charge, may warrant granting a new trial.[85] A new trial was awarded in one case, on the ground that the case had not been fully considered in certain important aspects.[86]

§ 1568. **Affidavits must be identified.**—When an order is made granting a new trial on affidavits, if the affidavits are not identified so as to entitle them to be considered on appeal, the order will be reversed.[87] And the identification must show that they were read or referred to on the argument; the ordinary indorsement of filing by the clerk is not sufficient.[88]

§ 1569. **Exceptions must be taken.**—A new trial will not be granted where one of the jurors was a stockholder in the company defendant, if the fact was known to counsel for plaintiff before entering on the trial, and no objection was made until after the trial had proceeded for some time;[89] nor for interest of a juror, if known to counsel before the trial;[90] nor that the judge is partial, if then known to counsel.[91] The absence of a juror, and suspension of examination thereby without objection, is held no objection to the verdict.[92] Where, on trial of questions

83 Rogers v. Niagara Ins. Co., 2 Hall, 599. As to alleged incapacity of attorney, on account of his intoxication, as ground for new trial, see Fitch v. Ellison, 15 Colo. 418, 24 Pac. 872.

84 Symons v. Bunnell, 80 Cal. 330, 22 Pac. 193.

85 Conrad v. Williams, 6 Hill, 444.

86 Mills v. Van Vorhies, 20 N. Y. 412, 10 Abb. Pr. 152. That improper conduct of party, calculated to influence the jury, is ground for new trial, see Burke v. McDonald, 3 Idaho, 296, 29 Pac. 98; Palmer v. Utah etc. Ry. Co., 2 Idaho, 315, 13 Pac. 425.

87 Dean v. Pritchard, 9 Nev. 232; State v. Parsons, 7 Nev. 57.

88 Johnson v. Muir, 43 Cal. 542. The present California Code of Civil Procedure, differs in its terms from the former Practice Act, under which the above decision was rendered. See Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

89 Orrok v. Commonwealth Ins. Co., 21 Pick. 456, 32 Am. Dec. 271.

90 Kent v. City of Charlestown, 2 Gray, 281.

91 Crosby v. Blanchard, 7 Allen, 385.

92 Eastman v. Tuttle, 1 Cow. 248; Ex parte Hill, 3 Cow. 355; Steward v. Hinkel, 72 Cal. 187, 13 Pac. 494.

of fact, material facts have been proved but not found, a request should be made to modify the findings to include the additional facts, or to make further findings, and only on refusal to make such modifications and corrections does ground for new trial exist.[93] The defense that suit is prematurely brought must be raised by the pleadings, and not be first brought up on motion for a new trial.[94]

§ 1570. **Grounds of motion.**—A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved.[95] It is within the discretion of the court to set aside a verdict in consequence of irregularity in the conduct of the jury.[96] The misconduct must be shown, and it must be shown to have resulted to the injury of the party against whom verdict was rendered.[97] A new trial will not be granted merely on the ground of harmless error.[98] So in a criminal case,[99] if the misconduct or irregularity is satisfactorily proved, positive injury need not be shown.[100] Where the judgment is rendered at nine A. M. upon a summons citing defendant to appear at ten A. M. a new trial will be ordered.[101] So, also, if after the jury has once retired, they are allowed to come into court and receive instructions in the absence of the parties or their counsel.[102] If the court, after the case is submitted, examines books of account as evidence which have not been given in evidence during the trial, the "irregularity" must be stated in the record to be one of the grounds on which motion will be made for a new trial.[103] Where it is evident the jury acted under

93 Shuler v. Lashhorn, 67 Kan. 694, 74 Pac. 264.

94 Leo Kee v. Wah Sing Chong, 31 Wash. 678, 72 Pac. 473.

95 Sannickson v. Brown, 5 Cal. 58.

96 United States v. Gillies, Pet. C. C. 159, Fed. Cas. No. 15206; Knight v. Inhabitants of Freeport, 13 Mass. 218; McIlvaine v. Wilkins, 12 N. H. 474, 476; People v. Douglass, 4 Cow. 26, 15 Am. Dec. 332; Wright v. Burchfield, 3 Ohio, 53; Smith v. Harrow, 3 Bibb, 446; Reynolds v. Champlain Trans. Co., 9 How. Pr. 7; Cain v. Cain, 1 B. Mon. 213; Hanks v. State, 21 Tex. 526; Drummond v. Leslie, 5 Blackf. 453; Busick v. State, 19 Ohio, 198.

97 Smith v. Thompson, 1 Cow. 221; Horton v. Horton, 2 Cow. 589; Oliver v. First Presbyterian Church, 5 Cow. 283; Wilson v. Abrahams, 1 Hill, 207; Harrison v. Price, 22 Ind. 165.

98 Gaynor v. Clements, 16 Colo. 209, 26 Pac. 324.

99 Whelchell v. State, 23 Ind. 89.

100 Johnson v. Root, 2 Fish. Pat. Cas. 291, 2 Cliff. 108, Fed. Cas. No. 7409. Compare Henry v. Ricketts, 1 Cranch C. C. 545, Fed. Cas. No. 6385; Madden v. State, 1 Kan. 340.

101 Parker v. Shephard, 1 Cal. 132.

102 Redman v. Gulnac, 5 Cal. 148.

103 Wilcoxson v. Burton, 27 Cal. 237, 87 Am. Dec. 66.

a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be granted.[104] Or where it is manifest from the testimony that the verdict of the jury must have been given under a state of great excitement,[105] or contrary to the instructions of the court.[106] But that one of the jurors "knew and was aware of the circumstances connected with the affair," if no objection to him was made until after verdict rendered, is not sufficient ground.[107]

§ 1571. Irregularities.—If the character of a witness is called in question during the trial, it is an irregularity for the judge to make a remark from the bench indorsing the respectability of the witness, and, if the testimony of the witness is material, judgment should be reversed for such irregularity; but if the testimony be immaterial, the judgment will not be reversed, though the conduct of the judge be disapproved.[108] In a trial by the court, if testimony be admitted on the hearing against the objections of a party, and afterwards on the determination of the cause the court exclude such testimony from its consideration, it is an irregularity, for the parties are entitled to have the case determined in accordance with the ruling at the trial.[109] Erroneous remarks made by the court are not errors of law, but, if errors, are an irregularity in the proceedings.[110] Where the jury, after having been out for a long time considering their verdict, return into court and report that they are unable to agree, and the court gives them further instructions, closing with the remark, "You must agree upon a verdict; I cannot discharge you until you agree upon a verdict," and the jury soon return with a verdict of no cause of action, the verdict is irregular as obtained by constraint.[111] After the jury retire for deliberation, it is error for the judge trying the cause to send a communication to them, unless by consent of counsel on both sides, and the better practice is to communicate in open court.[112] No objection

104 Minturn v. Burr, 20 Cal. 48.
105 People v. Acosta, 10 Cal. 195.
106 Myers v. Fear, 21 Okla. 498, 96 Pac. 642.
107 Lawrence v. Colliers, 1 Cal. 37.
108 McMinn v. Whelan, 27 Cal. 319.
109 Carpentier v. Small, 35 Cal. 364.
110 Hopkins v. Kitts, 37 Mont. 26, 94 Pac. 201; Mont. Rev. Codes, § 6794, subd. 1.
111 Slater v. Mead, 53 How. Pr. 57. See, also, Mahoney v. San Francisco Ry. Co., 110 Cal. 471, 42 Pac. 968.
112 Plunkett v. Appelton, 51 How. Pr. 469.

to the temporary absence of the judge from the court-room during a portion of the trial can be considered, if the motion for new trial is not made on the ground of irregularity, and the objection was not urged at the time.[113]

§ 1572. **Insufficient grounds.**—It is no ground for setting aside a verdict that there were good grounds of challenge to a juror;[114] nor that the court rejected a competent juror;[115] nor the withdrawal of a juror, and the continuance of a case thereby.[116] Or where the officer in charge permits a juror to go into his own house to change his linen, if in sight of the officer.[117] The bare fact that evidence is brought to the notice of the jury out of its regular order[118] is insufficient. Where the attorney for the prevailing party, at the request of one of the jurors, after their retirement, sent for a bottle of liniment which had been prepared for the juror to relieve his pain, and the liniment was passed in by the officer, it was held that this was not such an irregularity as would vitiate the verdict.[119] The sickness of a juror during the trial which is not so severe as to incapacitate him from performing his duties, is not ground for a new trial.[120] There is a marked distinction between the performance of an act of humanity or duty towards a juror and the voluntary offer of civilities, such as treating with spirituous liquors.[121] The fact that instructions given by the court are lost or mislaid is no ground for a motion for new trial.[122] Nor that a deposition alleged to contain material matter was lost, if not used on the trial.[123] If a juror, before retiring, asks the clerk as to a fact appearing from the records, and no objection is made, a new trial should not be granted.[124] Calling in the clerk to inquire if they were correctly informed how to make the computation, no injury resulting,[125] is not sufficient grounds. Where a slip of newspaper was handed

113 O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

114 Thompson v. Paige, 16 Cal. 77; Hollingsworth v. Duane, Wall. C. C. 147, Fed. Cas. No. 6618.

115 West v. Forrest, 22 Mo. 344.

116 Benedict v. Cozzens, 4 Cal. 382.

117 State v. O'Brien, 7 R. I. 336.

118 Rice v. Cunningham, 29 Cal. 492.

119 Carnaghan v. Ward, 8 Nev. 30.

120 People v. Brown, 76 Cal. 573, 18 Pac. 678.

121 Id. The latter was held sufficient to set aside the verdict in Sacramento etc. M. Co. v. Showers, 6 Nev. 291.

122 Visher v. Webster, 13 Cal. 58.

123 Chapman v. Chapman, 4 Call (Va.) 430.

124 Allen v. Blunt, 2 Woodb. & M. 121, 147, Fed. Cas. No. 217.

125 Dennison v. Powers, 35 Vt. 39.

by the deputy sheriff to the jury during the trial, containing matters relating to the trial, and the court subsequently instructed the jury that the slip was not in evidence, and should be wholly disregarded, and it appeared that the perusal could not have prejudiced the losing party, it was held not ground for new trial.[126] In Illinois, where the sheriff communicates with the jury by remarks, he may be fined.[127] Where a juror read a report of the cause in a newspaper to which he was a regular subscriber, it is not sufficient grounds;[128] or had heard the case discussed, if the objection be not raised at the proper time.[129] Where the interference of strangers with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice has thereby been done, it is not sufficient.[130] Where a sealed verdict was given to the officer in charge of the jury, the clerk being absent, which was given to the clerk next morning, and the next morning the verdict is opened in presence of the jury and read by the clerk, without exception, it is not sufficient ground for a new trial.[131] A new trial will not be granted in a criminal case because the sheriff takes charge of the jury where a deputy sheriff was sworn, nor because the judge informs the jury, through the sheriff, that if they do not agree in five minutes they must remain in the jury-room over night.[132]

§ 1573. **Taking out papers.**—If the jury take out plaintiff's account without the consent of the defendant, the court will grant a new trial.[133] But if the papers taken out without consent are not read by the jury, it is held no ground for setting aside the verdict.[134] Or that they took out through mistake a deposition which was irrelevant and immaterial to the issue. *Aliter,*

126 Thrall v. Smiley, 9 Cal. 529. See, also, to the same effect, United States v. Gilbert, 2 Sumn. 19, Fed. Cas. No. 15204.

127 Reins v. People, 30 Ill. 256.

128 United States v. Reid, 12 How. 361, 13 L. Ed. 1023.

129 State v. Daniels, 44 N. H. 383.

130 People v. Boggs, 20 Cal. 432; affirmed in People v. Symonds, 22 Cal. 353. But see Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141. Compare People v. Murray, 85 Cal. 350, 24 Pac. 666.

131 Paige v. O'Neal, 12 Cal. 483.

132 People v. Hughes, 29 Cal. 257.

133 Hutchinson v. Decatur, 3 Cranch C. C. 291, Fed. Cas. No. 6956. See, also, United States v. Clarke, 2 Cranch C. C. 152, Fed. Cas. No. 14810. Contra: Simms v. Templeman, 5 Cranch C. C. 163, Fed. Cas. No. 12872.

134 Hackley v. Hastie, 3 Johns. 252. Compare Mitchell's Case, 1 City H. Rec. 147.

if it was delivered to the jury by the counsel of the party in whose favor the verdict was rendered.[135] The jury having found a sealed verdict, but upon being polled one of them dissented, and on being sent out for further deliberation, they all concurred in the same verdict, it was held no irregularity.[136] The mere fact that a juror attempts to communicate the verdict to a party in whose favor it is rendered, before its announcement, is not sufficient ground for setting a verdict aside.[137]

§ 1574. **Affidavit.**—Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.[138] The affidavit need not be made by a juror guilty of the misconduct complained of;[139] and it seems it may be made by the sheriff having the jury in charge.[140] Being in derogation of the common law, this statute must be strictly construed, and will only be allowed in case of a chance verdict.[141]

§ 1575. **Chance verdict.**—The verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside.[142] Where the jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiff was justly entitled to recover, which amounts, after being added together, should be divided by twelve, and that the quotient should be their verdict, is a chance verdict, if they agree to be bound by the result.[143] It is not a chance verdict within the meaning of the statute, so as to permit the affidavits of jurors to impeach it.[144] That is not a chance verdict, if they do not agree to be bound by the result,

135 Lonsdale v. Brown, 4 Wash. C. C. 148, Fed. Cas. No. 8494.

136 Bunn v. Hoyt, 3 Johns. 255; Douglass v. Tousey, 2 Wend. 352, 20 Am. Dec. 616.

137 Nash v. Byrnes, 14 Abb. Pr. 12.

138 Cal. Code Civ. Proc., § 657, subd. 2.

139 Donner v. Palmer, 23 Cal. 48.

140 Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78.

141 Turner v. Tuolumne County Water Co., 25 Cal. 400.

142 Donner v. Palmer, 23 Cal. 40.

143 Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Mulock v. Lawrence, 5 City H. Rec. 85; Denton v. Lewis, 15 Iowa, 301; Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103.

144 Turner v. Tuolumne County Water Co., 25 Cal. 400; Boyce v. California Stage Co., 25 Cal. 473; Hoare v. Hindley, 49 Cal. 274; Archibald

but reserve to themselves the right to dissent.[145] Where a portion of the jury are induced to assent by drawing lots, it is a chance verdict.[146] So, also, where their assent is obtained by matching coins.[147] A juror cannot directly or indirectly impeach his own verdict, except on the ground of obtaining a verdict by a resort to chance.[148] The burden is on the movant.[149]

§ 1576. Misconduct.—Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, ground for a new trial, or where there is no ground of suspicion that they have been tampered with,[150] even if verdict be subsequently modified;[151] otherwise, where there is a suspicion of abuse.[152] Where a juror drinks liquor as a remedy for disease, after retiring in charge of the officer, a new trial will be granted.[153] The propriety of this rule is doubted in *Wilson* v. *Abrahams* (1 Hill, 208); and in *Harrison* v. *Rowan* (4 Wash. C. C. 32, Fed. Cas. No. 6142) it was held that the mere fact of the jurors having taken refreshments, if not furnished by either party to the suit, was not sufficient ground to set aside the verdict; nor when prisoner's counsel consented in open court to this indulgence, unless shown that the indulgence was grossly abused and operated injuriously to the prisoner.[154] And in Arkansas it has been held that the mere fact that one of the jury during the trial, in company

v. Kolitz, 26 Utah, 226, 72 Pac. 935; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

145 Wilson v. Berryman, 5 Cal. 44, 63 Am. Dec. 78; Lee v. Clute, 10 Nev. 149; Conklin v. Hill, 2 How. Pr. 6; Fowler v. Colton, Burn. 175; Barton v. Holmes, 16 Iowa, 252; Pence v. California Min. Co., 27 Utah, 378, 75 Pac. 934.

146 Levy v. Brannan, 39 Cal. 485.

147 Donner v. Palmer, 23 Cal. 40.

148 Cal. Code Civ. Proc., § 657, subd. 2; Siemsen v. Oakland etc. El. Ry., 134 Cal. 494, 66 Pac. 672.

149 Archibald v. Kolitz, 26 Utah, 226, 72 Pac. 935; Pence v. California Min. Co., 27 Utah, 378, 75 Pac. 924.

150 In re McKenn's Estate, 143 Cal. 580, 77 Pac. 461; Ex parte Hill, 3 Cow. 355; People v. Douglass, 4 Cow. 26, 15 Am. Dec. 332; Everett v. Youells, 4 Barn. & Ad. 681; State v. Barton, 19 Mo. 227; State v. Harlow, 21 Mo. 446; State v. Igo, 21 Mo. 459; Green v. Bliss, 12 How. Pr. 428; Oliver v. First Presb. Church, 5 Cow. 283; Smith v. Thompson, 1 Cow. 221; Horton v. Horton, 2 Cow. 589; Perkins v. Ermel, 2 Kan. 325; Anthony v. Smith, 4 Bosw. 503; People v. Moore, 41 Cal. 238.

151 Nims v. Bigelow, 44 N. H. 376; Nininger v. Knox, 8 Minn. 140; Dozenback v. Raymer, 13 Colo. 451, 22 Pac. 787; Kirby v. Western Union Tel. Co., 4 S. Dak. 105, 46 Am. St. Rep. 765, 55 N. W. 759, 30 L. R. A. 612.

152 Oliver v. First Presb. Ch., 5 Cow. 283.

153 Brant v. Fowler, 7 Cow. 562; State v. Baldy, 17 Iowa, 39; State v. Bullard, 16 N. H. 139.

154 United States v. Gibert, 2 Sumn. 19, Fed. Cas. No. 15204.

with the officer, visited a saloon and took a glass of liquor, will not be sufficient ground of itself for granting a new trial, unless it appear that the defendant was prejudiced, although such conduct is reprehensible.[155] The fact that during the trial one of the jurors was accused of a grave crime, and employed one of the counsel for the successful party to defend him, is not ground for a new trial, where it does not appear that the juror was rendered incompetent or failed to give due attention to the testimony and arguments.[156] Visiting the premises by the jury to enable them to understand the evidence introduced on the trial cannot deprive the court of its jurisdiction to grant a new trial, which it should do, notwithstanding a conflict in the evidence, if fully convinced that the verdict was wrong.[157] Proof of declarations of juror made after verdict cannot be received for the purpose of impeaching it.[158] A conversation of a juror with any person in regard to the trial, in order to vitiate the verdict, must have been of such a nature as to impress the case on the juror's mind in an aspect different from that presented by the evidence.[159] Where a juror on his *voir dire* fails to disclose a material fact as to his relations to either of the parties in answer to questions that should bring out that fact, it is sufficient, if the party is thereby deceived, to entitle him to a new trial.[160] A new trial cannot be granted on grounds of prejudice of the people of the county where the action was tried to such extent that an impartial jury could not be obtained.[161] If a juror on his *voir dire* represents that he has not expressed an opinion or shown himself to be biased, when in fact he had, and the parties were deceived by his representations, it is ground for a new trial, as matter of right.[162] Examination of the scene of an accident, by one

155 Kee v. State, 28 Ark. 155; Roman v. State, 41 Wis. 312; Russell v. State, 53 Miss. 367. But see March v. State, 44 Tex. 64; Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474. As to intoxication of juror as ground for new trial, see Ipswich v. Fernandez, 84 Cal. 639, 24 Pac. 298. As to intoxication of judge and jury, see Repath v. Walker, 13 Colo. 109, 21 Pac. 917.

156 Hill v. Corcoran, 15 Colo. 270. As to improper discussion of case by jury before its final submission, see Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190, 22 Pac. 590.

157 McQueen v. Mechanics' Institute, 107 Cal. 163, 40 Pac. 114.

158 Hollingsworth v. Duane, Wall. C. C. 147, Fed. Cas. No. 6618.

159 March v. State, 44 Tex. 64. See, also, Taylor v. State, 52 Miss. 84.

160 Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411.

161 Anderson v. Mammoth Min. Co., 26 Utah, 357, 73 Pac. 412.

162 Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769.

of the jurors, when such examination cannot affect the issues, is not ground for new trial.[163] The mere disclosure of the verdict by a juror, after it has been agreed upon, sealed, and delivered to the clerk, although reprehensible, is not sufficient of itself to invalidate the verdict.[164] The amendment of 1862 to section 193 of the California Practice Act, allowing the affidavits of the jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously.[165]

§ 1577. Impeaching verdict.—Ordinarily the affidavits of jurors are not admissible to impeach their verdict, either for error or mistake in respect to their verdict, nor for irregularity or misconduct of themselves or their fellows,[166] or to show they intended something different,[167] except under special circumstances;[168] as where mistake arises from misdirection of the judge, or conduct equivalent thereto.[169] But where the foreman of the jury by mistake announces a verdict different from that agreed upon, the affidavit of jurors may be introduced to establish that fact if the application be made at once to the court to correct the record to conform to the actual finding.[170] By subdivision 2 of section 657 of the California Code of Civil Procedure, the affidavit of a juror may be used to prove a resort to chance in determining the verdict;[171] but this statute, being in derogation of the common law, must be strictly construed, and will not be held to include such kinds of misconduct as do not come clearly

163 Siemsen v. Oakland etc. El. Ry., 134 Cal. 494, 66 Pac. 672.

164 Ingersoll v. Truebody, 40 Cal. 603.

165 Donner v. Palmer, 23 Cal. 40.

166 1 T. R. 11; 2 T. R. 281.

167 2 Tidd, 817; Sargent v. Dennison, 5 Cow. 121; Rex. v. Woodfall, 5 Burr, 2661; Turner v. Tuolumne Water Co., 25 Cal. 400; People v. Hughes, 29 Cal. 257; Boyce v. California Stage Co., 25 Cal. 473; Clum v. Smith, 5 Hill, 560; Ladd v. Wilson, 1 Cranch C. C. 305, Fed. Cas. No. 7977; Green v. Bliss, 12 How. Pr. 428; Dana v. Tucker, 4 Johns. 487; Reins v. People, 30 Ill. 256; Brownell v. McEwen, 5 Denio, 367; Cline v. Broy, 1 Or. 89; People v. Columbia Com. Pleas, 1 Wend. 297; Jackson v. Dickenson, 15 Johns. 309, 8 Am. Dec. 236; Hughes v. Listner, 23 Ind. 396; Edmiston v. Garrison, 18 Wis. 594; Taylor v. Everett, 2 How. Pr. 23.

168 Little v. Birdwell, 21 Tex. 597, 73 Am. Dec. 242.

169 Ex parte Caykendoll, 6 Cow. 53.

170 Dalrymple v. Williams, 63 N. Y. 361, 20 Am. Rep. 544.

171 Siemsen v. Oakland S. L. & H. El. Ry., 134 Cal. 494, 66 Pac 672.

within the descriptive terms of the statute.[172] In Utah, affidavits of the jurors may be used to show the verdict was gained by chance, and counter-affidavits of others of the jurors may be used to deny the same;[173] but that is not the rule in Washington.[174] But such affidavits may be received to show improper conduct of the successful party in approaching them on the subject;[175] or they may be introduced to sustain the verdict,[176] but not to show that they misunderstood its effect.[177] A new trial, sought upon the ground of alleged misconduct of a juror in using improper language in the jury-room, is properly denied when such misconduct is attempted to be shown by the affidavit of a third person to whom the juror had stated the circumstances, especially where the use of the language is denied by the affidavit of the juror himself and some of his fellow-jurors.[178]

§ 1578. Surprise.—The affidavit on a motion for new trial, on the ground of surprise by non-attendance of witnesses, should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses,[179] and that the results of the new trial will probably be different.[180] There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from "accident" or "surprise."[181] The last two terms, as used in legal parlance, have substantially the same mean-

172 Turner v. Tuolumne Water Co., 25 Cal. 400. See, also, Hoare v. Hindley, 49 Cal. 274. As regards affidavits to impeach verdict, see § 1574, ante; People v. Azoff, 105 Cal. 632, 39 Pac. 59. As to counter-affidavits, see Smith v. Whittier, 95 Cal. 280, 30 Pac. 529.

173 Archibald v. Kolitz, 26 Utah, 226, 72 Pac. 935; Black v. Rocky Mountain Bell Tel. Co., 26 Utah, 451, 73 Pac. 514; Pence v. California Min. Co., 27 Utah, 378, 75 Pac. 934.

174 Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

175 Reynolds v. Champlain Trans. Co., 9 How. Pr. 7.

176 Dana v. Tucker, 4 Johns. 487. See, also, Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141.

177 Polhemus v. Heiman, 50 Cal. 438.

178 State v. Anderson, 14 Mont. 541, 37 Pac. 1.

179 Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273; Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300; Warren v. Ritter, 11 Mo. 354; Clifford v. Denver etc. R. R. Co., 12 Colo. 125, 20 Pac. 333. The party alleging surprise should show it conclusively. Gaines v. White, 2 S. Dak. 410, 50 N. W. 901; affirming 1 S. Dak. 434, 47 N. W. 524; Morse v. Swan, 2 Mont. 306. As to necessity of affidavits on the motion, see Leete v. Sutherland, 20 Nev. 71, 15 Pac. 472; Orr v. Haskell, 2 Mont. 225. Continuance must be asked for. Romero v. Desmarais, 4 N. Mex. 367, 20 Pac. 787.

180 Hill v. McKay, 36 Mont. 440, 93 Pac. 345; McGuire v. Drew, 83 Cal. 225, 23 Pac. 312.

181 Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835.

ing.[182] It must set forth due diligence.[183] The facts constituting legal surprise should be shown by the affidavits of the attorney, and not by the client.[184] Where the application is on the ground of surprise by the testimony of a witness, the affidavit should show that such testimony is not true.[185] A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake, and that it was injurious to the party, and that he had no means or had used due diligence to correct it.[186] The party must show by his own affidavit that the new evidence was not known to him at the time of the former trial, and the affidavit of others to this effect will not suffice.[187] Surprise caused by the fact that the court did not go to view the premises, as defendant had expected, will not warrant new trial.[188]

§ 1579. Application, when made.—The general rule is that a party surprised on the trial must apply for relief at the earliest practicable moment, and in such method as will produce the least vexation, expense, and delay; but the rule may be relaxed where the party has been guilty of no laches, and acts in good faith.[189]

§ 1580. Grounds of motion.—Accident or surprise, such as ordinary prudence could not have guarded against, is a good ground for a motion for a new trial.[190] But an order denying a new trial on this ground will not be reversed unless there has been an abuse of discretion.[191] The surprise must be some matter of fact, not of law.[192] Thus where one party to an action is

182 McGuire v. Drew, 83 Cal. 225, 23 Pac. 312.

183 Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300. See McLear v. Happood, 85 Cal. 557, 24 Pac. 788; Flersheim Mer. Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183.

184 Schellhous v. Ball, 29 Cal. 605.

185 People v. Jocelyn, 29 Cal. 562; Phenix v. Baldwin, 14 Wend. 62.

186 Howe v. Briggs, 17 Cal. 385; Reeder v. Trader's Nat. Bank, 28 Wash. 139, 68 Pac. 461.

187 Smith v. Shook, 30 Mont. 30, 75 Pac. 513.

188 Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93.

189 Delmas v. Martin, 39 Cal. 555.

190 Patterson v. Ely, 19 Cal. 28; Cook v. De La Guerra, 24 Cal. 237; Brooks v. Lyon, 3 Cal. 113; Moore v. L. A. Infirmary, 49 Cal. 669; Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; People v. Marks, 10 How. Pr. 261; De Leyer v. Michaels, 5 Abb. Pr. 203; Peck v. Hiler, 30 Barb. 655; Colorado etc. Railway Co. v. Bowles, 14 Colo. 85, 23 Pac. 467; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225. Compare Dewey v. Frank, 62 Cal. 343.

191 Nooney v. Mahoney, 30 Cal. 226.

192 Craig v. Fanning, 6 How. Pr. 336.

misled by the act of the other, justice demands that a new trial should be granted.[193] Where a defendant, whose property has been attached, files an evasive answer under oath, admitting the indebtedness sued on, and then, on a trial between an intervener and the plaintiff, testifies that the debt was not due, it is sufficient cause for new trial on the ground of surprise.[194] Where a party to an action, previous to the trial, is told by a witness that he will testify in a certain manner to a material fact, and, relying on his statement, neglects to procure other testimony, and when called to the stand, the witness, either by collusion or by any occurrence for which the party calling the witness is not responsible, testifies contrary to what he had previously stated, it is surprise in the sense in which the word is used, provided the party shows that he will be able on the new trial to supply the testimony required.[195] Where it clearly appears that a witness has made a mistake in his testimony upon a material point which was in its nature calculated to, and probably did, decide the verdict, a new trial will be granted;[196] but not where the witness acknowledging the mistake is only one of several who testify to the same point.[197] Where defendant testified to payment, and plaintiff after such testimony had no time to produce evidence, but afterwards found witnesses who, refreshing their memory from an examination of plaintiff's books, could testify as to what took place at the time and place of the alleged payments, in disproval of defendant's testimony, it was held good ground for a new trial for surprise and newly discovered evidence.[198] If a witness absent himself after he has appeared, so that he cannot be examined, it is a surprise, and is ground for a new trial.[199]

If documents were ruled out which had been read without objection on a former trial, it is a surprise, and good ground for a new trial.[200] Where the court, upon adopting the findings of a referee, held that a part only of defendant's counterclaims

193 Pinkham v. McFarland, 5 Cal. 137.

194 Coghill v. Marks, 29 Cal. 673.

195 Rodriguez v. Comstock, 24 Cal. 85.

196 Coddington v. Hunt, 6 Hill, 595.

197 Mersereau v. Pearsall, 6 How. Pr. 293.

198 Parshall v. Klinck, 43 Barb. 203. But see Berry v. Metzler, 7 Cal. 418, where it is held to be only ground for a continuance.

199 Tilden v. Gardiner, 25 Wend. 663; Ruggles v. Hall, 14 Johns. 112.

200 Helm's Exrs. v. Jones' Admx., 9 Dana, 26.

were sufficiently pleaded, which was contrary to his holding in passing upon demurrer to such counterclaims, it is sufficient surprise to warrant a new trial.[201] And where seduction was sworn to on a certain day, not mentioned in the complaint, and on which day the defendant was able to prove an *alibi* by witnesses who were not present at the trial, a new trial was granted.[202] Where in a suit for damages, in which the defendant answers denying damage in the amount claimed, the court enters judgment for damages, *non obstante veredicto,* after plaintiff had gone into proof as to damages, and the jury had returned a verdict upon the facts for a less amount than that claimed, and less than the amount for which judgment was rendered, it was held that going into proof, etc., might well have induced defendant not to move to amend his answer, which motion the court would probably have granted, and hence defendant might have been taken by surprise.[203] Where plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial.[204] Where defendant had a good defense, but was prevented from making it by accident, and without fault on his part, a new trial will be awarded.[205] But where a party lost his opportunity of defense by his own negligence a new trial will not be granted;[206] so on a misdirection of the court in a matter not material to the merits of the cause.[207]

§ 1581. **Insufficient grounds.**—If the party alleging surprise "can relieve himself from embarrassment in any mode, either by nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief."[208] A party will not be refused a new

201 Porter v. Industrial Printing Co., 26 Mont. 170, 66 Pac. 839, 67 Pac. 67.

202 Sargent v. Dennison, 5 Cow. 106.

203 Reniff v. The Cynthia, 18 Cal. 669.

204 Eagan v. Delaney, 16 Cal. 85.

205 Ford v. Ford, Walk. (Miss.) 505, 12 Am. Dec. 587.

206 Dodge v. Strong, 2 Johns. Ch. 228; Dorflinger v. Coil, 2 Ham. (Ohio) 311; Hoomes v. Kuhn, 4 Call. (Va.) 274; Green v. Robinson, 5 How. (Miss.) 80; Hill v. McKay, 36 Mont. 440, 93 Pac. 345.

207 Maynor v. Lewis, 2 Ga. Dec. 205.

208 Schellhous v. Ball, 29 Cal. 608; Ames v. Howard, 1 Sumn. 482, Fed. Cas. No. 326; Carr v. Gale, 1 Curt. C. C. 384, Fed. Cas. No. 2433; Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Bailey v. Richardson, 66 Cal. 416, 5 Pac. 910; Fincher v. Malcolmson, 96 Cal. 38, 30 Pac. 835.

trial because when taken by surprise at unexpected testimony he did not ask for a continuance, if he had no knowledge at the time of evidence to rebut such testimony.[209] Want of preparation is a ground for continuance, but no ground for a new trial.[210] So where a witness absents himself without leave, and no attachment is asked for, it is no ground for a new trial.[211]

Mere surprise at the evidence given by the witnesses of the defendant or of the adverse party is not sufficient ground for a new trial.[212] Or because witnesses did not state facts which the party expected they would state.[213] Especially where it is not shown that proof can be made upon another trial of the facts, of which the want of proof occasioned the surprise.[214] Nor where the plaintiff, testifying in his own behalf, sustains the averment of his own complaint.[215] Surprise at the testimony of a witness in stating a certain conversation incorrectly is no ground for a new trial.[216] A party cannot be surprised by his opponent making good by proof the allegations of his plea;[217] nor at the ruling of the court on the admission of testimony;[218] nor at the failure of the court to view the premises;[219] nor that the attorney was mistaken as to the time of the meeting of the court, and was therefore not present.[220] The plaintiff cannot be heard to complain of surprise at the requirement of evidence on his part clearly called for by the issues, even though he was led by the defendant (without fraud) to suppose that the fact in issue would be admitted.[221] A party cannot have a new trial on this ground, to enable him to rebut testimony, which he was aware before the former trial might be introduced;[222] nor that the party was surprised in a matter of law;[223] nor that the party had given the

209 Alger v. Merritt, 16 Iowa, 121.

210 Turner v. Morrison, 11 Cal. 21; Stout v. Calver, 6 Mo. 254, 35 Am. Dec. 438; Jackson v. Roe, 9 Johns. 77.

211 Stewart v. Small, 5 Mo. 525.

212 Live Yankee Co. v. Oregon Co., 7 Cal. 42; Taylor v. California Stage Co., 6 Cal. 228; Shepard v. Citizens' Ins. Co., 8 Mo. 272; Beach v. Tooker, 10 How. Pr. 297.

213 Martin v. Clark, Hempst. 259, Fed. Cas. No. 9158a.

214 Mayfield v. State, 44 Tex. 59.

215 Cox v. Hutchings, 21 Ind. 219; Peek v. Hensley, 21 Ind. 344.

216 Klockenbaum v. Pierson, 22 Cal. 160.

217 Armstrong v. Davis, 41 Cal. 494.

218 Fuller v. Hutchings, 10 Cal. 523, 70 Am. Dec. 746.

219 Miller v. Scoble, 8 Cal. App. 344, 97 Pac. 93.

220 Steigers v. Darby, 8 Mo. 679.

221 Taylor v. Harlow, 11 How. Pr. 285.

222 Meakim v. Anderson, 11 Barb. 215; Blake v. Madigan, 65 Me. 522; Knapp v. Fisher, 49 Vt. 94.

223 Hite v. Lenhart, 7 Mo. 22.

suit no further attention, having instructed his attorney to accept compromise;[224] nor that the party was mistaken as to the nature of his case,[225] nor the unexpected close of plaintiff's case.[226] If a mistake of law can ever be made the means of obtaining a new trial on the ground of surprise, it certainly cannot when it is caused by the negligence of such party.[227] A new trial will not be granted on the ground of surprise caused by the rejection of evidence, when such evidence would not, in the judgment of the court, have varied the result.[228] The introduction of false evidence relating solely to a point not necessarily involved in the decision of the action is no ground for a new trial.[229] Surprise at the admission of a witness, because his attorney had advised him that the witness was incompetent, is no ground for a new trial.[230] The mistake of counsel as to competency of a witness is no ground for a new trial,[231] nor as to what witnesses would testify.[232] Mere surprise at the result of a trial is no ground for a new trial.[233] Reliance upon the word of a reputable attorney may be excusable neglect, for which relief may be granted on the ground of surprise.[234]

§ 1582. **What must be shown.**—The cases establish that the party must prove the surprise, how he was injured by it, and that no laches are justly attributed to him;[235] that the surprise has not resulted from the fault or negligence of the moving party;[236] that the verdict is mainly attributable to the facts out of which

224 Patchin v. Wegman, 19 Mo. 151.

225 Robbins v. Alton Ins. Co., 12 Mo. 380.

226 Wells v. Sanger, 21 Mo. 354.

227 People v. O'Brien, 4 Park. Cr. 203.

228 Foote v. Silsby, 1 Blatchf. 445, Fed. Cas. No. 4916.

229 Guy v. Hanly, 21 Cal. 397.

230 Klockenbaum v. Pierson, 22 Cal. 160.

231 Packer v. Heaton, 9 Cal. 568.

232 Robbins v. Alton Ins. Co., 12 Mo. 380.

233 Lane v. Brown, 22 Ind. 239.

234 Robertson v. Williams, 81 Cal. 268, 22 Pac. 665. See Symons v. Bunnell, 80 Cal. 330, 22 Pac. 193. Compare McGuire v. Drew, 83 Cal. 225, 23 Pac. 312; Mitchell v. Downing, 23 Or. 448, 32 Pac. 394.

235 Brooks v. Douglass, 32 Cal. 208; Patterson v. Ely, 19 Cal. 28; Stephens v. Chiles, 1 A. K. Marsh. 334; Blythe v. Sutherland, 3 McCord, 258; Libenintz's Admr. v. Greenland, 2 McCord, 313; Smith v. Morrison, 3 A. K. Marsh. 81; McFarland's Admr. v. Clark, 9 Dana, 134.

236 Rogers v. Huie, 1 Cal. 429, 54 Am. Dec. 300; Schellhous v. Ball, 29 Cal. 605; Whetmore v. Murdock, 3 Woodb. & M. 380, Fed. Cas. No 17509; Henckley v. Hendrickson, 5 McLean, 170, Fed. Cas. No. 6348; Snowhill v. Knapp, 7 N. Y. Leg. Obs. 15.

the surprise resulted;[237] that he has a valid defense; and that on new trial the result may be different.[238]

§ 1583. Affidavit.—Newly discovered evidence relied on to obtain a new trial has no place in a statement. It should be presented in affidavits.[239] An affidavit made merely on information and belief cannot be considered.[240] A motion for new trial under subdivision 1 of section 657 of the Code of Civil Procedure, for irregularities in the proceedings of the court, must be made on affidavits.[241] Motions for new trial on the ground of newly discovered evidence must be regarded with suspicion and disfavor. In such cases the motion must be supported by the affidavit of the moving party that he did not know the newly discovered evidence,[242] and usually by the affidavits of the newly discovered witnesses, showing what they know and will testify,[243] and it should be free from the suspicion of bad faith.[244] The affidavit of the party cannot be received in lieu of the affidavits of such witnesses, unless for good cause shown it appears that the affidavits of the latter cannot be obtained in time, or in such further time as may have been granted for that purpose.[245] The witness's affidavit must be produced, or proof that it cannot be obtained,[246] or a sufficient excuse be furnished for its absence,[247] or time be obtained for its production.[248] The best possible proof must be adduced of the existence of the newly discovered evidence.[249] Affidavits for and against the motion may properly be considered.[250] They must contain the facts showing diligence.[251] If an affidavit states that the new witness merely "told" the

237 Schelhous v. Ball, 29 Cal. 605; People v. Mack, 2 Park. Cr. 673; De Leyer v. Michaels, 5 Abb. Pr. 203; Hartwright v. Badham, 11 Price, 383.

238 Cook v. De La Guerra, 24 Cal. 237; McClusky v. Gerhauser, 2 Nev. 47, 90 Am. Dec. 512; Hill v. McKay, 36 Mont. 440, 93 Pac. 345.

239 Beans v. Emanuelli, 36 Cal. 117.

240 Gay v. Torrance, 145 Cal. 144, 78 Pac. 540.

241 Id.

242 Baker v. Joseph, 16 Cal. 180; Arnold v. Skaggs, 35 Cal. 684; Smith v. Shook, 30 Mont. 30, 75 Pac. 513.

243 Hare v. Sproul, 2 How. (Miss.) 772.

244 Merk v. Gelzhaeuser, 50 Cal. 631.

245 Arnold v. Skaggs, 35 Cal. 684.

246 Rogers v. Huie, 1 Cal. 433, 54 Am. Dec. 300; Jenny Lind Co. v. Bower, 11 Cal. 194; Case v. Codding, 38 Cal. 194; Denn v. Morrell, 1 Hall, 382; Smith v. Cushing, 18 Wis. 295.

247 Smith v. Cushing, 18 Wis. 295.

248 Jenny Lind Co. v. Bower, 11 Cal. 194.

249 Smith v. Cushing, 18 Wis 295.

250 Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

251 Hersheim Mercantile Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183.

party the facts relied on, it is insufficient.[252] An affidavit of counsel, based upon information and belief of what a witness will testify, is insufficient to secure a new trial on the ground of newly discovered evidence.[253]

§ 1584. Diligence must be shown.—To justify a new trial on this ground, it must be shown that the party moving used reasonable diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own laches;[254] that the strictest diligence is required, and that the evidence will change the result, where the evidence is merely cumulative.[255] If by due diligence a witness can be obtained to rebut evidence which is a surprise to party, he cannot have a new trial because of such surprise.[256] And the application should state what diligence was used, absence from state being

252 Shumway v. Fowler, 4 Johns. 425. See, also, as to the requisites and sufficiency of the affidavit, Gaines v. White, 1 S. Dak. 434, 47 N. W. 524; People v. Urquidas, 96 Cal. 239, 31 Pac. 52; Bate v. Miller, 63 Cal. 233; Kern Valley Bank v. Chester, 55 Cal. 49; Ross v. Sedgwick, 69 Cal. 247, 10 Pac. 400; People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375; Braithwaite v. Aiken, 2 N. Dak. 57, 49 N. W. 419; Goose River Bank v. Gilmore, 3 N. Dak. 188, 54 N. W. 1032; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; Thompson v. Thompson, 88 Cal. 110, 25 Pac. 962; Madden v. Occidental etc. S. S. Co., 86 Cal. 445, 25 Pac. 5. As to identification of affidavits, see People v. Fredericks, 106 Cal. 554, 39 Pac. 944.

253 Cole v. Thornburg, 4 Colo. App. 95, 34 Pac. 1013.

254 Butler v. Vassault, 40 Cal. 74; Arnold v. Skaggs, 35 Cal. 684; Baker v. Joseph, 16 Cal. 173; Howard v. Winters, 3 Nev. 539; Goodrich v. Kimble, 49 Wash. 516, 95 Pac. 1084; Williams v. Baldwin, 18 Johns. 489; Vandervoort v. Smith, 2 Caines, 155; Palmer v. Mulligan, 3 Caines (N. Y.), 307, 2 Am. Dec. 270; Jackson v. Malin, 15 Johns. 293; People v. Mack, 2 Park. Cr. 673; People v. Superior Court, 10 Wend. 285; Macy v. De Wolf, 3 Woodb. & M. 193, Fed. Cas. No. 8933; Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109; Whetmore v. Murdock, 3 Woodb. & M. 380, Fed. Cas. No. 17509; People v. Superior Court, 5 Wend. 115; Leavy v. Roberts, 8 Abb. Pr. 310, 2 Hilt. 285; Fellows v. Emperor, 13 Barb. 92; People v. Marks, 10 How. Pr. 261; De Lima v. Glassell, 4 Hen. & M. 369; Floyd v. Jayne, 6 Johns. Ch. 479; Campbell v. Genet, 2 Hilt. 290; Washburn v. Gould, 3 Story, 122, Fed. Cas. No. 17214; Palmer v. Fisk, 2 Curtis, 14, Fed. Cas. No. 10691; Prevost v. Gratz, Pet. C. C. 364, Fed. Cas. No. 11406; Garrison v. United States, 2 Ct. of Cl. (Nott & Hop.) 382; Fikes v. Bentley, Hempst. 61, Fed. Cas. No. 4785a; Dickson v. Mathers, Hempst. 65, Fed. Cas. No. 3898a; Coote v. Bank of United States, 3 Cranch C. C. 95, Fed. Cas. No. 3203; Leschi v. Territory, 1 Wash. T. 23; Nininger v. Knox, 8 Minn. 140; Arthur v. Chavis, 6 Rand. 142; Doubleday v. Makepeace, 4 Blackf. 9, 28 Am. Dec. 33; Carson v. Cross, 14 Iowa, 463.

255 Levitsky v. Johnson, 35 Cal. 41.

256 Rand v. Kipp, 27 Mont. 138, 69 Pac. 714.

no excuse for want of diligence.[257] There must be a satisfactory showing of reasonable diligence.[258] Diligence or the want of it in a particular case depends in a great degree upon the circumstances surrounding the parties and the conduct of the cause, which are peculiarily within the knowledge of the trial court, and its action will rarely be interfered with on appeal.[259] A new trial will not be granted when the discovered evidence is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried.[260] Where certain deeds were known to be in a certain bank and defendant did not attempt to get them until shortly before the trial, and they could not be found until after trial, the diligence is not sufficient to warrant a new trial.[261] If materiality is discovered during trial, a continuance should be asked for, or a new trial will be refused.[262] As, also, where plaintiff, in a second trial, testified that his wife was present at the transaction in question, and on the former trial that no one else was there besides the parties.[263] If new evidence was within reach of the moving party before the trial, his ignorance of its materiality cannot excuse his lack of diligence in securing and presenting it, and it cannot be made the basis of a new trial.[264] But where a witness on the former trial did not disclose all the knowledge he had relative to the facts, it is not ground for a new trial.[265]

257 Burnley v. Rice, 21 Tex. 171; Edmiston v. Garrison, 18 Wis. 594.

258 Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596; Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Moran v. Abbey, 63 Cal. 56; Nesbit v. People, 19 Colo. 441, 36 Pac. 221; Gaines v. White, 2 S. Dak. 410, 50 N. W. 901; Barton v. Laws, 4 Colo. App. 212, 35 Pac. 284.

259 Jones v. Singleton, 45 Cal. 94. See, also, Brown v. Luehrs, 79 Ill. 575; Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225; Heintz v. Cooper, 104 Cal. 668, 38 Pac. 511.

260 Weimer v. Lowery, 11 Cal. 104; Vardeman v. Edwards, 21 Tex. 737.

261 Mattern v. Suddarth, 65 Kan. 862, 70 Pac. 874.

262 Berry v. Metzler, 7 Cal. 418; Klockenbaum v. Pierson, 22 Cal. 160.

263 Smith v. Shook, 30 Mont. 30, 75 Pac. 513.

264 People v. Freeman, 92 Cal. 359, 28 Pac. 261; In re Colbert's Estate, 31 Mont. 461, 107 Am. St. Rep. 439, 78 Pac. 971, 80 Pac. 248; Armstrong v. Aragona, 13 N. Mex. 19, 79 Pac. 291; Flersheim Mercantile Co. v. Gillespie, 14 Okla. 143, 77 Pac. 183; Monmouth Pottery Co. v. White, 27 Utah, 236, 75 Pac. 622; Collins v. Bacon, 38 Wash. 80, 80 Pac. 268; Bullock v. White Star S. S. Co., 30 Wash. 448, 70 Pac. 1106; Jordan v. City of Seattle, 30 Wash. 298, 70 Pac. 743. That counter-affidavits may be used to show that due diligence has not been used, see People v. Cesena, 90 Cal. 381, 27 Pac. 300; Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

265 Davis v. Presler, 5 Smedes & M.

§ 1585. Evidence must not be cumulative.—It must be shown that it is new material, and not cumulative.[266] If merely cumulative, it is no ground for a new trial.[267] There is no presumption that newly discovered evidence is cumulative; and if it does not appear to be so in the moving papers, the fact must be shown by the party opposing the motion, or he cannot complain.[268] Newly discovered cumulative evidence furnishes no ground for a new trial, unless it is of so controlling a character that it would probably change the verdict.[269] The best definition of the term "cumulative evidence" is that in *Parker* v. *Hardy* (24 Pick. 246), viz.: "Cumulative evidence is additional evidence of the same kind to the same point."[270] That only is cumulative which is in addition to or corroborative of what has been given at the trial,[271] and even though it tends to corroborate the evidence of a party to the suit.[272] Evidence is cumulative if it supports evidence

459; Phillips v. Ocmulgee Mills, 55 Ga. 633.

266 Bartlett v. Hogden, 3 Cal. 55; Reed v. Clark, 47 Cal. 194; Live Yankee Co. v. Oregon Co., 7 Cal. 42; Taylor v. California Stage Co., 6 Cal. 228; Gaven v. Dopman, 5 Cal. 342; Klockenbaum v. Pierson, 22 Cal. 160; Spencer v. Doane, 23 Cal. 418; Aldrich v. Palmer, 24 Cal. 513; Cutler v. Steamer Columbia, 1 Or. 101; Howard v. Winters, 3 Nev. 539.

267 Benson v. Town of Hamilton, 34 Wash. 201, 75 Pac. 805; Ryder v. Leach, 3 Ariz. 129, 77 Pac. 490; Wood v. Moulton, 146 Cal. 317, 80 Pac. 92; In re Doolittle's Estate, 153 Cal. 29, 94 Pac. 240; Bower v. Self, 68 Kan. 825, 75 Pac. 1021; Cole v. Thornburg, 4 Colo. App. 95, 34 Pac. 1013; Levitsky v. Johnson, 35 Cal. 41; Stoakes v. Monroe, 36 Cal. 383; Cox v. Hutchings, 21 Ind. 219; Sturgeon v. Ferron, 14 Iowa, 160; Wilhelmi v. Thorington, 14 Iowa, 537; Fleming v. Hollenback, 7 Barb. 271; People v. Superior Court, 10 Wend. 285; Pike v. Evans, 15 Johns. 210; Steinbach v. Columbia Ins. Co., 2 Caines, 129; Edmiston v. Garrison, 18 Wis. 594; State v. Stumbo, 26 Mo. 306; State v. Wightman, 27 Mo. 121; Whitbeck v. Whitbeck, 9 Cow. 266; Brisbane v. Adams, 1 Sandf. 195; Burnett v. Phalon, 4 Bosw. 622; Leavy v. Roberts, 2 Hilt. 285; Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109; Wheelwright v. Beers, 2 Hall, 391, Nason v. Cockroft, 3 Duer, 366; Peck v. Hiller, 30 Barb. 655; Adams v. Bush, 23 How. Pr. 262; Macy v. De Wolf, 3 Woodb. & M. 193, Fed. Cas. No. 8933; Ames v. Howard, 1 Sumn. 482, Fed. Cas. No. 326; Long v. Citizens' Bank, 8 Utah, 104, 29 Pac. 878; Garfield etc. Mining Co. v. Hammer, 6 Mont. 54, 8 Pac. 153; People v. Peacock, 5 Utah, 237, 14 Pac. 332; Link v. Union Pacific Ry. Co., 3 Wyo. 680, 29 Pac. 741; Reed v. Drais, 67 Cal. 491, 8 Pac. 20; Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; McCormick v. Central R. R. Co., 75 Cal. 508, 17 Pac. 542; Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596.

268 Hobler v. Cole, 49 Cal. 250.

269 Windham County Bank v. Kendall, 7 R. I. 77; State v. O'Brien, 7 R. I. 336; Heaton v. Manhattan Ins. Co., 7 R. I. 502; O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930.

270 Bradish v. State, 35 Vt. 452.

271 Gray v. Harrison, 1 Nev. 502.

272 O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975.

introduced on the trial to prove facts of secondary importance, the tendency of which was to prove the facts in issue.[273] But if it would bring to light some new fact bearing upon the main issue, it is not cumulative.[274] Where the question as to whether newly discovered evidence upon which a new trial is asked is cumulative is involved in doubt, an order granting a new trial therefor will not be disturbed upon appeal, where there has been no manifest abuse of discretion by the trial court.[275] But where every material fact of the alleged newly discovered evidence is contradicted by counter-affidavits, the discretion of the court in refusing a new trial will not be interfered with.[276] Evidence upon some fact which is specifically distinct, and bears upon the issue, is not cumulative, though it may be intimately connected with parts of the other testimony.[277] So proof that plaintiff had acknowledged settlement of the demand should not be deemed cumulative;[278] nor in a case of criminal conversation, proof that plaintiff had for some time been living in adultery.[279]

§ 1586. **Must not be impeaching.**—It must be shown that it is not to impeach an adverse witness. It must go to the merits of the case, and not be such as tends merely to discredit a witness,[280] except in very rare cases, such as where the whole question is one of identity of persons long deceased. To give an opportunity of impeaching the character of a principal witness,[281] or where, in a criminal case, the affidavit of the principal witness stated that her evidence given on the trial was incorrect,

273 Stoakes v. Monroe, 36 Cal. 383; Gray v. Harrison, 1 Nev. 502.

274 Gray v. Harrison, 1 Nev. 502.

275 Kenezleber v. Wahl, 92 Cal. 202, 28 Pac. 225.

276 People v. Mesa, 93 Cal. 580, 29 Pac. 116. See Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157.

277 Alger v. Merritt, 16 Iowa, 121; Stineman v. Beath, 36 Iowa, 73; German v. Maquoketa Savings Bank, 38 Iowa, 368; Wilson v. Plank, 41 Wis. 94.

278 Guyot v. Butts, 4 Wend. 579.

279 Smith v. Masten, 15 Wend. 270.

280 Baker v. Joseph, 16 Cal. 180; People v. Anthony, 56 Cal. 397; People v. McCurdy, 68 Cal. 576, 10 Pac. 207; Fist v. Fist, 3 Colo. App. 273, 32 Pac. 719; Klockenbaum v. Pierson, 22 Cal. 160; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Deer v. State, 14 Mo. 348; Meakin v. Anderson, 11 Barb. 215; Beach v. Tooker, 10 How. Pr. 297; Simmons v. Fay, 1 E. D. Smith, 107; Carr v. Gale, 1 Curtis 384, Fed. Cas. No. 2433; United States v. Potter, 6 McLean, 182, Fed. Cas. No. 16077; Brooke v. Payton, 1 Cranch C. C. 128, Fed. Cas. No. 1934; Territory v. Latshaw, 1 Or. 146; Barrett v. Belshe, 4 Bibb. 348; Harrington v. Bigelow, 2 Denio, 109; Fleming v. Hollenback, 7 Barb. 271; Shumway v. Fowler, 4 Johns. 425.

281 Jackson v. Kinney, 14 Johns. 186; Jackson v. Hooker, 5 Cow. 207.

and her mother stated in an affidavit that she was unreliable.[282] new evidence on points formerly in issue must be of preponderating character, and decisive on the evidence to be overturned.[283] But where the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery.[284] Where the plaintiff in ejectment recovers on a paper title, and defendant discovers after the trial that plaintiff had conveyed his title to a third person before the commencement of the suit, a new trial should be granted.[285] But where the defense was forgery in an action on a note, a new trial was granted on the ground that the note, which at the time of the trial was lost, had since been found.[286] Admissions and conversations of a defendant, the purport of which is in direct conflict with his testimony in the case, and with the theory of his defense, are not impeaching but original evidence.[287]

§ 1587. **Must be material.**—It must be shown that it is material to the issue; and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if it had been in on the former trial;[288] or that it would materially vary the complexion of the cause.[289] If the new evidence would not be material as to the liability of one of the defendants, he cannot speak for the other defendant and seek a new trial.[290] Where a referee, after report had been made up, refused, from doubt as to his powers, to allow the introduction of newly discovered evidence, at the same time intimating in a supplemental report that if such evidence had been adduced on the trial the result would probably have been different, it was held to be good ground for a new trial.[291]

282 Mann v. State, 44 Tex. 642.

283 Finley v. Tyler, 3 Mont. 400.

284 Wright v. Carillo, 22 Cal. 595.

285 Cranmer v. Porter, 41 Cal. 462.

286 Platt v. Munroe, 34 Barb. 291.

287 Alger v. Merritt, 16 Iowa, 121.

288 Stoakes v. Monroe, 36 Cal. 383; State v. Locke, 26 Mo. 603; Vardeman v. Edwards, 21 Tex. 737; Gaffney v. Hoyt, 2 Idaho, 199, 10 Pac. 34; Francisco v. Benepe, 6 Mont. 243, 11 Pac. 637; Baumgarten v. Hoffman, 9 Utah, 338, 34 Pac. 294; Wimmer v. Simon, 9 Utah, 378, 35 Pac. 507; Turner v. Stevens, 8 Utah, 75, 30 Pac. 24. See Madden v. Occidental etc. S. S. Co., 86 Cal. 445, 25 Pac. 5.

289 Levitsky v. Johnson, 35 Cal. 41; United States v. Cornell, 2 Mason, 91, Fed. Cas. No. 14868; Ludlow v. Park, 4 Ham. 5.

290 Mazor v. Springer, 145 Cal. xviii, 78 Pac. 474.

291 Hoyt v. Saunders, 4 Cal. 345.

§ 1588. Must be subsequently discovered.—The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient.[292] But a fact which transpired since the verdict is not ground for a new trial.[293] A new trial for this cause is never granted if the existence of the new evidence was known to the applicant before the trial was had,[294] even though he had forgotten it at the time of the trial,[295] and though it was unknown to his counsel until after the trial.[296] Newly discovered testimony, consisting of facts within the knowledge of witnesses called by the movant and examined on the trial, will not authorize a new trial.[297]

To warrant a new trial on the ground of newly discovered evidence, it must appear, among other things, that the new evidence is not cumulative merely; that it is such as to render a different verdict reasonably probable upon a retrial; and that it could not, with reasonable diligence, have been discovered and produced at the trial.[298]

§ 1589. When new trial denied.—New trial will not be granted if the witnesses whose testimony is sought to be introduced are unworthy of belief,[299] nor if it is improbable that they could be obtained at the new trial.[300] Refusal of new trial for newly discovered evidence is not error, in absence of an affidavit that it was not known of at the time of the trial.[301] In contesting a motion for a new trial on the ground of newly discovered evidence, it is competent for the adverse party to show by affidavit that the witness whose testimony is stated is wholly unworthy of

292 Arnold v. Skaggs, 35 Cal. 684.

293 Johnson v. Johnson, 18 Colo. App. 493, 72 Pac. 604.

294 Jackson v. Malin, 15 Johns. 293; Vandervoort v. Smith, 2 Caines, 155; Macy v. De Wolf, 3 Woodb. & M. 193, Fed. Cas. No. 8933; Whetmore v. Murdock, 3 Woodb. & M. 380, Fed. Cas. No. 17509.

295 Fleming v. Hollenback, 7 Barb. 271; People v. Superior Court, 10 Wend. 285.

296 Young v. State, 56 Ga. 403.

297 Phillips v. Ocmulgee Mills, 55 Ga. 633; Archer v. Heidt, 55 Ga. 200; Gautier v. Douglass Manufacturing Co., 52 How. Pr. 325.

298 1 Hayne's New Trial and Appeal, § 88; approved, People v. Demasters, 109 Cal. 607, 42 Pac. 236.

299 Cole v. Cole, 50 How. Pr. 59; Fleming v. Hollenback, 7 Barb. 271; Macy v. De Wolf, 3 Woodb. & M. 193, Fed. Cas. No. 8933; Williams v. Baldwin, 18 Johns. 489. See Pomeroy v. Columbian Ins. Co., 2 Caines, 260.

300 Kendrick v. Delafield, 2 Caines, 67.

301 Spencer v. Spencer, 31 Mont. 631, 79 Pac. 320; Elliott v. Martin, 27 Mont. 519, 71 Pac. 756.

credit.[302] Where the affidavit on which the application is made is shown by counter-affidavits to be open to the suspicion of bad faith, and it also fails to raise a reasonable presumption that the new evidence, if produced, would change the result, a new trial will be denied.[303] To obtain a new trial in equity on the ground of newly discovered evidence, the complaint must show that the evidence was not discovered in time to have been used in the legal proceeding. If discovered in time to have been presented upon a motion for a new trial in the legal action, relief will be denied in equity.[304] On a conviction for larceny a new trial will not be granted to allow the prisoner to introduce evidence that the stolen property did not belong to the person named in the indictment.[305]

§ 1590. Motion on statement, etc.—When the application for a new trial is made for any other cause than those named in the first four subdivisions of the statute—that is, when it is made on the ground of excessive damages, insufficiency of the evidence to justify the verdict, etc., or for error in law occurring at the trial and excepted to by the party making the application—it may be made, at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case.[306] In such cases, probably the more frequent practice is to move on the statement of the case, though in some instances a bill of exceptions takes its place. It is not necessary to state the grounds at length where a motion is made on the minutes of the court, but reference may be made to the notice of intention to move for a new trial for the particulars.[307] A motion to disregard a statement on motion for a new trial will be sustained when such statement does not specify wherein the evidence is not sufficient to support the judgment.[308]

302 Williams v. Baldwin, 18 Johns. 489.

303 Merk v. Gelzhaeuser, 50 Cal. 631. See, also, Cole v. Cole, 50 How. Pr. 59.

304 Snider v. Rinehart, 20 Colo. 448, 39 Pac. 408; Ferrell v. Allen, 5 W. Va. 43. That newly discovered evidence as a ground of new trial is not regarded with favor, see Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

305 Foster v. State, 52 Miss. 695.

306 Cal. Code Civ. Proc., § 658; Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770.

307 Williams v. Hawley, 144 Cal. 97, 77 Pac. 762.

308 Robson v. Colson, 9 Idaho, 215, 72 Pac. 951.

§ 1591. **Bill of exceptions.**—If the motion is to be made upon a bill of exceptions, and no bill has already been settled, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as provided after the entry of judgment, or after receiving notice of such entry, and a bill shall be prepared and settled in like manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.[309] A statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either.[310] A statement of facts on the hearing of a motion for a new trial is not necessary under the Washington practice.[311] The judge cannot extend the time to prepare a statement on motion for a new trial to one who is in default.[312] A bill of exceptions on a motion for a new trial on the ground of insufficiency of the evidence should specify the particulars wherein it is insufficient.[313]

§ 1592. **Minutes of the court.**—When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain such specifications, when the motion is made on the minutes of the court, it must be denied.[314] As a statement has to be subsequently prepared in such cases in order to appeal from the order of the court,[315] the practice of moving on the minutes of the court is not common, but the statement is prepared for the hearing of the motion for a new trial, and the statement is then used on the appeal. The fact that a cause has been tried without the presence of an official reporter, and that no notes of the evidence

309 Cal. Code Civ. Proc., § 659, subd. 2.

310 Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

311 Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758.

312 Freese v. Freese, 134 Cal. 48, 66 Pac. 43.

313 Martin v. Matfield, 49 Cal. 45; Cal. Code Civ. Proc., § 648.

314 Cal. Code Civ. Proc., § 659, subd. 4. And see Weyl v. Sonoma Val. Railroad Co., 69 Cal. 202, 10 Pac. 510; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Neale v. Depot Railway Co., 94 Cal. 425, 29 Pac. 954.

315 See Cal. Code Civ. Proc., § 661.

or proceedings at the trial were ever filed or reduced to writing, does not deprive the losing party of the right to move for a new trial on the minutes of the court, but he may rely upon the recollection of the judge as to the evidence and proceedings, and can thereafter secure a statement of the case.[316] The order denying a motion for a new trial made on the minutes of the court can only be reviewed by embodying such minutes in the statement of the case.[317]

§ 1593. **Statement—Time for preparation.**—If the motion is to be made upon a statement of the case, the moving party must, within ten days after the service of the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare a draft of the statement, and serve the same or a copy thereof upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof upon the moving party.[318] An order extending the time within which to prepare a statement on motion for a new trial carries with it the same extension of time to serve the statement,[319] and give notice for its presentation.[320] The statement need not be served on all the attorneys of certain of the respondents, when attorneys representing all the respondents were properly served.[321] The same rule of law applies to bills of exceptions as to statements on motion for a new trial, in the respect that the party moving must prepare and serve his bill of exceptions within the time allowed by law for that purpose, or it cannot be settled, or, if settled, cannot be considered, either at the hearing of the motion or on appeal.[322]

316 Malcolmson v. Harris, 90 Cal. 262, 27 Pac. 206.

317 Perego v. Dodge, 9 Utah, 3, 33 Pac. 221.

318 Cal. Code Civ. Proc., § 659, subd. 3; Chase v. Evoy, 58 Cal. 348. As to time within which to make and serve statement, see Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114. As to extension of time therefor, see Curtis v. Superior Court, 70 Cal. 390, 11 Pac. 652; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301; Muir v. Galloway, 61 Cal. 498; Matthews v. Superior Court, 68 Cal. 638, 10 Pac. 128. As to relief from excusable neglect or mistake, see Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114.

319 Bryant v. Sternfeld, 89 Cal. 611, 26 Pac. 1091. As to proof of service of statement, see Wulf v. Manuel, 9 Mont. 276, 23 Pac. 723.

320 Douglas v. Southern Pacific Co., 151 Cal. 242, 90 Pac. 538.

321 Walsh v. Mueller, 14 Mont. 76, 35 Pac. 226.

322 Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50.

§ 1594. Contents of statement.—The evidence should be presented in a narrative form, or by statement of its substance, or what it tended to prove.[323] The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section 193 of the Practice Act,[324] and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.[325] Matters which do not seem to illustrate the point, such as verification, acknowledgment of deeds, and titles of courts, should be omitted,[326] substituting the words "duly verified," "duly acknowledged," "title of cause," etc.[327] But a skeleton statement containing the words "[here insert deed, etc.]," describing it, without consent of parties, will be stricken from the transcript,[328] and the court will not consider the questions which it is intended to present.[329] Nor will a mandate lie to compel the clerk of the lower court to certify such a statement, or to engross it, inserting the omitted documents in their proper places.[330] The action of the lower court in refusing to settle a statement on motion for a new trial cannot be reviewed on appeal.[331] It is seldom necessary to insert an entire deed; it is sufficient to say that a deed was introduced from A. to B., showing that A.'s title has vested in B.[332] The deed may be inserted in the transcript, if it is mentioned in the statement as having been in evidence, with a certificate of the judge that it was before him on motion for a new trial.[333] Transcripts of records and deeds, where no point is made on the construction of the language, may be referred to by a brief statement.[334] Where documentary evidence is referred to, the appellant cannot insert copies of the same in the transcript on appeal without the assent of the other party, unless the statement has been engrossed and settled and afterwards authenticated, or unless the originals are on file and form part of the

323 People v. Getty, 49 Cal. 581.
324 Cal. Code Civ. Proc., § 657.
325 Harper v. Minor, 27 Cal. 109.
326 Estate of Boyd, 25 Cal. 513.
327 Id.; Marriner v. Smith, 27 Cal. 654; Provost v. Piper, 9 Cal. 552.
328 Kimball v. Semple, 31 Cal. 657.
329 Bush v. Taylor, 45 Cal. 112.
330 People v. Bartlett, 40 Cal. 142.
331 Machado v. Kinney, 135 Cal. 354, 67 Pac. 331.
332 Kimball v. Semple, 31 Cal. 658; Albion Min. Co. v. Richmond Min. Co., 19 Nev. 225, 8 Pac. 480.
333 Hess v. Winder, 30 Cal. 349.
334 Knowles v. Inches, 12 Cal. 212.

records.[335] But a proposed statement should not be rejected because it contains reference to documentary evidence, with the remark "[here insert]," notifying the opposite party that it is to become part of the statement. Such reference in an engrossed statement would render it a skeleton statement, but a proposed statement is not to be rejected, or settlement thereof refused, on that account.[336] Where the admission in evidence of a judgment-roll is relied upon as error, the statement should contain either the record or paper so admitted, or a settled abstract thereof, in order that the court may judge of its admissibility.[337] And if a party relies on the insufficiency of the evidence, and a statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the case necessary to explain the points involved, and that no different case would be presented as to such points had all omitted evidence been inserted.[338] It is the duty of the party moving for a new trial to present a statement containing the grounds upon which he intends to rely, and so much of the evidence as may be necessary to explain the same, and no more.[339] The reporter's notes do not constitute a statement, and cannot be considered on appeal.[340] The specification of particulars or errors should be made a part of the proposed statement, for without it neither the adverse party nor the judge can well know how much of the evidence should be set forth.[341]

§ **1595. Specifications of particulars.**—When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the

335 Kimball v. Semple, 31 Cal. 657.

336 Reclamation District v. Hamilton, 112 Cal. 603, 44 Pac. 1074. As to waiver of objection for lack of signature to statement, see Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906.

337 Doyle v. Franklin, 48 Cal. 537.

338 Abbey Homestead Assoc. v. Willard. 48 Cal. 615.

339 Adams v. Lambard, 80 Cal. 426, 22 Pac. 180.

340 People v. Armstrong, 44 Cal. 327; Becker v. Commissioners, etc., 10 Mont. 87, 24 Pac. 700; Barger v. Halford, 10 Mont. 57, 24 Pac. 699.

341 Barrett v. Tewksbury, 15 Cal. 354.

hearing of the motion.[342] The specifications should be contained in the statement; it is not sufficient that they are upon an annexed, unsigned paper.[343] They constitute the basis of the statement, and if wanting, the statement should be disregarded.[344] No point will be considered unless it is specified.[345] If a paper purporting to be a statement on motion for a new trial does not contain a specification of the particular grounds relied on, there is no such statement as is required by statute, and nothing on which the court can act.[346]

A specification of the particular grounds of error is the essential element of a statement;[347] and all errors to which objection is made on motion for a new trial should be specified;[348] as that the suit is barred by a former adjudication between the same parties, upon the same subject-matter; that the cause of action is barred by the statute of limitations; that the property in question was the separate property of the wife. So an erroneous instruction may be assigned as error, if there be any evidence rendering it pertinent to the issue,[349] and may be stated thus: that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question. So as to other errors of law.[350] The specifications should distinguish each particular proposition of fact excepted to from all others involved in the findings of the court or in the verdict of the jury.[351] A specification which

342 Cal. Code Civ. Proc., § 659, subd. 3.

343 Spencer v. Long, 39 Cal. 700.

344 Id; Elder v. Shaw, 12 Nev. 78.

345 Hawkins v. Abbott, 40 Cal. 639.

346 Hutton v. Reed, 25 Cal. 478; Walls v. Preston, 25 Cal. 59.

347 Hutton v. Reed, 25 Cal. 483; Partridge v. City etc. San Francisco. 27 Cal. 415.

348 Crowther v. Rowlandson, 27 Cal. 376; Burnett v. Pacheco, 27 Cal 408. See, also, as to necessity of specification of errors in statement, Bohnert v. Bohnert, 95 Cal. 444, 30 Pac. 590; Nye v. Marysville etc. R. R. Co., 97 Cal. 461, 32 Pac. 530; Paris v. Raynor, 76 Cal. 647, 18 Pac. 788; Donohoe v. Mariposa Min. Co., 66 Cal. 317, 5 Pac. 495; Graham v. Stewart, 68 Cal. 374, 9 Pac. 555; Earles v. Gilham, 20 Nev. 46, 49, 14 Pac. 586, 588; Demers v. McCormick, 5 Mont. 234, 2 Pac. 350; Dawson v. Baum, 3 Wash. T. 464, 19 Pac. 46; Gilberson v. Miller Smelting Co., 4 Utah, 46, 5 Pac. 699; Slater v. Union Pacific Ry. Co., 8 Utah, 178, 30 Pac. 493; Williams v. Dennison, 94 Cal. 540, 29 Pac. 946; Hershey v. Kness, 75 Cal. 115, 16 Pac. 548; Fleming v. Albeck, 67 Cal. 226, 7 Pac. 659.

349 Barrett v. Tewksbury, 15 Cal. 359.

350 Allgro v. Duncan, 24 How. Pr. 210; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

351 Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31.

attacks mere conclusions of law is not sufficient.[352] A general specification, "that the court erred in giving to the jury instructions asked by plaintiff," is insufficient.[353] Specifications are not sufficient to entitle the evidence to be reviewed where they merely state generally what the evidence shows, and do not purport to state the particulars wherein the evidence is insufficient to justify the finding or verdict.[354] Maps, models, and diagrams used to illustrate the evidence of the witnesses, but not put in evidence, need not be embodied in the statement.[355] The court may or may not permit an amendment of a statement that is insufficient.[356] It is held, when the statement on motion for new trial contains no specification of errors complained of, it is error to grant a new trial, even though the notice of motion does contain a specification of errors.[357] The error must be specified, if there is but one question of error that could be raised.[358] If, at the close of a statement on motion for new trial, the moving party says that he "will rely, on the argument of the motion for new trial in this cause, upon the following grounds," and then enumerates his grounds, he will be considered as abandoning all the grounds not enumerated. It is not enough that in the history of a case exceptions appear scattered here and there through a statement made on motion for new trial, but it is necessary in the statement to specify the particular errors upon which the party will rely.[359] Specifications of the "particulars in which the court erred" cannot be considered as specifications of the particulars wherein the evidence was insufficient. Nor is it an

352 Anthony v. Jillson, 83 Cal. 296, 23 Pac. 419.

353 Joyce v. White, 95 Cal. 236, 30 Pac. 524.

354 Haight v. Tryon, 112 Cal. 4, 44 Pac. 318. See Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Green v. Green, 103 Cal. 108, 37 Pac. 188; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Kumle v. Grand Lodge etc. 110 Cal. 204, 42 Pac. 634; Silva v. Holland, 74 Cal. 530, 16 Pac. 385; Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Patent Brick Co. v. Moore, 75 Cal. 205, 16 Pac. 890; Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738; Knott v. Peden, 84 Cal. 299, 24 Pac. 160; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31. Compare Estate of Yoakam, 103 Cal. 503, 37 Pac. 485; Smith v. Ellis, 103 Cal. 294, 37 Pac. 400.

355 Albion Min. Co. v. Richmond Min. Co., 19 Nev. 225, 8 Pac. 480.

356 Freeman v. Brown, 5 Colo. App. 516, 90 Pac. 970; Cal. Code Civ. Proc., § 473.

357 Sterling v. Parsons, 9 Utah, 81, 33 Pac. 245; Canal Co. v. Edwards, 9 Utah, 477, 35 Pac. 487; overruling Stevens v. Higginbotham, 6 Utah, 215, 21 Pac. 946. See Ferrer v. Home Mut. Insurance Co., 47 Cal. 416.

358 Zenith Gold etc. Min. Co. v. Irvine, 32 Cal. 302.

359 Beans v. Emanuelli, 36 Cal. 117.

error of law that the evidence is insufficient to justify a particular finding of fact.[360] The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points specified;[361] but evidence not bearing on those points should be excluded.[362] It is presumed that the statement on motion for a new trial contains all the evidence pertinent to the motion.[363] In Nevada, however, it has been uniformly held that an order denying a motion for new trial on the ground of insufficiency of evidence was proper, where the motion was made on a statement failing to show expressly that all the evidence was before the court; and where a new trial was granted by the court below on such a defective statement the order was reversed.[364]

An application on the ground of error in instructions must point out with reasonable certainty and particularity the error complained of.[365] Error in disregarding the evidence offered by defendant to show the title to the lands in dispute to be in him, and in sustaining either or any of the objections made by the plaintiff to the admissibility of said evidence, or any part thereof, is a defective specification, and the form disapproved, but the point was considered under the peculiar circumstances of the case.[366] The findings of the court need not be embodied in the statement or bill of exceptions.[367] But if a new trial is applied for on the ground that the findings are against the evidence, a specification of the particulars in which each finding is deemed against the evidence is necessary.[368]

§ 1596. **Settlement of statement.**—If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. If amendments are proposed and adopted, the statement

360 Smith v. Christian, 47 Cal. 18.

361 Hutton v. Reed, 25 Cal. 483; McMinn v. Whelan, 27 Cal. 319.

362 Harper v. Minor, 27 Cal. 107; Estate of Boyd, 25 Cal. 513.

363 Clark v. Gridley, 35 Cal. 398; Hidden v. Jordan, 28 Cal. 301; Abbey Homestead Assoc. v. Willard, 48 Cal. 614; Cereghino v. Cereghino, 4 Utah, 100, 6 Pac. 528.

364 Libby v. Dalton, 9 Nev. 23.

365 Estep v. Larsh, 21 Ind. 183; Peck v. Hensley, 21 Ind. 344; Joyce v. White, 95 Cal. 236, 30 Pac. 524.

366 Sharp v. Lumley, 34 Cal. 611.

367 Reynolds v. Harris, 8 Cal. 618.

368 Le Roy v. Rogers, 30 Cal. 229, 89 Am. Dec. 88.

shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or delivered to the clerk of the court for the judge.[369] Where a proposed statement is served on the attorney of the adverse party within the time limited by law, and the proposed amendments thereto are adopted by the moving party, the statement as amended may be presented to the judge or delivered to the clerk for settlement within any reasonable time thereafter.[370] No notice of the refusal of the moving party to adopt proposed amendments is required to be given, other than the delivery of the statement and amendments to the clerk or judge.[371] If not adopted, the proposed statement and amendments shall, within ten days thereafter (i. e. after the service of the amendments), be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exceptions.[372]

Where the court settles and certifies a statement on which motion was to be made on agreement of the attorneys for both sides that it was correct, and thereafter denied two motions to set such statement aside and correct it, it cannot do so of its own motion six months later.[373] *Mandamus* is the exclusive remedy to compel a judge to settle a statement on motion for a new trial, and it is his duty to settle it.[374] Where objections are made to the settlement of a statement on motion for a new trial, on the ground that the time for settlement had expired, and such fact appears from the record, the court has no jurisdiction to settle the same.[375] But it is within the discretion of the court, on proper application, in case of excusable neglect, to relieve a party from his failure to serve the statement on time.[376] If the action was heard by a referee, the statement shall be settled by him as prescribed in section 650 of the California Code of Civil Procedure.[377]

369 Cal. Code Civ. Proc., § 659, subd. 3.

370 Pendergrass v. Cross, 73 Cal. 475, 15 Pac. 63. See Smith v. City of Stockton, 73 Cal. 204, 14 Pac. 675.

371 Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685.

372 Cal. Code Civ. Proc., § 650.

373 Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590.

374 Hartmann v. Smith, 140 Cal. 461, 74 Pac. 7.

375 Hochnan v. New York Dry Goods Co., 8 Idaho, 66, 67 Pac. 796.

376 Bailey v. Kreutzmann, 141 Cal. 519, 75 Pac. 104.

377 Cal. Code Civ. Proc., § 659.

§ 1597. **Duty of judge on settlement.**—It is the duty of the judge, or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement.[378] If the motion be made on the minutes of the court and a statement be afterwards prepared, it shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.[379] When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed.[380] The parties may, by stipulation, waive the signature of the judge or referee.[381] Judges, judicial officers, and the supreme court possess, respectively the same power in settling and certifying statements as is conferred upon them in settling and certifying bills of exceptions under the code.[382] The court below loses jurisdiction to settle and allow a statement on motion for a new trial after appeal taken.[383] Affidavits used on the hearing of a motion for a new trial, and not indorsed by the judge or clerk, "at the time as having been read or referred to on the hearing" of the motion for new trial, will be stricken from the statement on appeal.[384]

§ 1598. **Settlement of statement—Continued.**—Where a motion for a new trial is to be made on a statement of the case, an order denying the motion before the statement has been settled and certified by the court is erroneous.[385] Where the statement does not appear to have been settled by the trial judge and signed by him, and contains no specification of errors, the granting of a new trial upon such a statement is error.[386] Where the successor of the judge who tried an action hears and denies the motion for a new trial, made upon the records and minutes of the court, the subsequent statement on appeal from the order denying the mo-

378 Cal. Code Civ. Proc., § 659, subd. 3.
379 Cal. Code Civ. Proc., § 661.
380 Cal. Code Civ. Proc., § 659, subd. 3.
381 Sarver v. Garcia, 49 Cal. 218.
382 Cal. Code Civ. Proc., § 653.
383 Thomas v. Sullivan, 11 Nev. 280.
384 Albion Min. Co. v. Richmond Min. Co., 19 Nev. 225, 8 Pac. 480; Dean v. Pritchard, 9 Nev. 232.
385 Stewart v. Taylor, 68 Cal. 5, 8 Pac. 605.
386 Slater v. Union Pacific Ry. Co., 8 Utah, 178, 30 Pac. 493.

tion should be settled by the judge who made the order, and not by his predecessor who tried the action.[387] A statement which is not signed by the judge, with his certificate to the effect that the same is allowed, will be stricken from the record on motion in the appellate court, and no implied authentication by waiver will be recognized.[388] Notice of settlement to the adverse party is not necessary, when no amendments have been filed within the time allowed by law.[389] An unexplained delay of seven months in presenting a statement to the trial judge for settlement is fatal.[390] Where a motion is made to disregard a statement on the ground that it had not been presented within the time allowed by law, stipulations of counsel, and orders of the court, an order denying such motion determines nothing against the mover. The objections made by him may be preserved in the statement before settlement, and the presumption is that if well taken the court below will give him the benefit of them.[391] The trial judge may properly refuse to settle a statement if the notice of the motion for a new trial or the proposed statement has not been served in time, and he cannot be required to settle such statement merely to be used on appeal from the judgment.[392] The action of the trial court in allowing the moving party to insert in the proposed statement a request for its settlement and allowance is not erroneous, although the amendment was made after the time for filing the statement had expired.[393] *Mandamus* is a proper remedy to compel a judge to settle a statement on motion for new trial in a case where it is his duty to do so.[394] But this remedy was refused in a case where the notice of motion for new trial was made too late.[395]

§ **1599. Filing statement.**—When settled and certified by the judge or referee, the statement must be filed with the clerk.[396]

387 Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903.

388 Scherrer v. Hale, 9 Mont. 63, 22 Pac. 151.

389 Wulf v. Manuel, 9 Mont. 276, 279, 286, 23 Pac. 723. See Barbaires v. Gregory, 64 Cal. 230, 30 Pac. 805; Mellor v. Crouch, 76 Cal. 594, 18 Pac. 685. As to time of settlement of statement, see Wills v. Rhen Kong, 70 Cal. 548, 11 Pac. 780.

390 Connor v. Southern California Motor Road Co., 101 Cal. 429, 35 Pac. 990.

391 Arnold v. City of San Jose, 81 Cal. 621, 22 Pac. 878.

392 Jue Fook Sam v. Lord, 83 Cal. 159, 23 Pac. 225.

393 Richardson v. City of Eureka, 96 Cal. 444, 31 Pac. 458.

394 State v. Murphy, 19 Nev. 89, 6 Pac. 840.

395 Clark v. Crane, 57 Cal. 629.

396 Cal. Code Civ. Proc., § 659, subd. 3.

The practice in Nevada differs from that in California.[397] Under the Nevada statute, it has been held that the objection that the statement was not filed in time could not be raised on appeal unless it had been made on the hearing of the motion below.[398] And an order extending the time to file the statement must either be filed with the papers of the case or entered on the minutes of the court within the time prescribed by statute.[399] Under the former California statute it was held that a stipulation by counsel to the correctness of a statement, and "waiving all informalities in respect to filing and service of the same," made on the day when it should have been filed, did not justify the moving party in neglecting to file the statement for five months afterwards; and that such neglect was a waiver of the right to move for a new trial.[400] And although the objection might be waived by the adverse party, the party urging such waiver must make it affirmatively appear.[401]

§ 1600. **Waiver of filing.**—A statement of the case on motion for a new trial is not required to be filed until it has been signed by the judge with his certificate that it is allowed. When filed, and not before, it becomes a part of the record.[402] If filed before it is settled, it need not be filed afterwards.[403] If the statement is actually left with the clerk for filing before the motion is submitted, this would be sufficient, whether it is indorsed as filed by the clerk or not; but a certificate or affidavit of the clerk that the statement was not left with him for filing until after the motion had been passed upon, is binding on the appellate court, and will prevail over the affidavit of the appellant to the contrary, unless steps are taken to have the clerk's certificate corrected, if false.[404] Notice of intention to move for a new trial may be waived by not raising the objection either on the settlement of the statement or on the hearing of the motion.[405] Where the time for filing a statement is extended "to" a certain date, the

397 See Nev. Comp. Laws, § 3292.

398 Twist v. Kelly, 11 Nev. 377.

399 Clark v. Strouse, 11 Nev. 76. See, also, Robinson v. Benson, 19 Nev. 331, 10 Pac. 441.

400 O'Neil v. Dougherty, 47 Cal. 164.

401 Munch v. Williamson, 24 Cal. 167.

402 Biagi v. Howes, 66 Cal. 469, 6 Pac. 100.

403 Gately v. Irvine, 51 Cal. 172.

404 Mills v. Dearborn, 82 Cal. 51, 22 Pac. 1114.

405 Cereghino v. Cereghino, 4 Utah, 100, 6 Pac. 523. See Sell v. Graves, 14 Mont. 341, 36 Pac. 354.

date named is included within the period prescribed.[406] A stipulation for ninety days' additional time begins to run from expiration of the statutory time.[407] But extension of time for filing statement does not extend the time for filing notice of motion for new trial.[408]

§ 1601. Discretion of court.—Where there is an insufficiency of evidence to sustain the verdict, a new trial may be granted. It rests in the discretion of the court.[409] If a jury renders a verdict against the plain principles of law as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial, notwithstanding the particular circumstances or general justice of the case.[410] An error of the trial court in rendering conclusions of law which are not supported by the findings is an error which should be reviewed by a direct appeal from the judgment, and is not a "decision against law" for which a new trial should be granted.[411] The fact that the evi-

406 Penn Placer Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878.

407 Hill v. McKay, 36 Mont. 440, 93 Pac. 345.

408 McGrath v. Tallent, 7 Utah, 256, 26 Pac. 574. As to extending time for serving statement, see Elliot v. Whitmore, 10 Utah, 253, 37 Pac. 463.

409 Potter v. Carney, 8 Cal. 574; Visher v. Webster, 13 Cal. 60; Lewis v. Covillaud, 21 Cal. 178; Oullahan v. Starbuck, 21 Cal. 413; Phelps v. Union C. M. Co., 39 Cal. 407; Lorenzana v. Camarillo, 41 Cal. 467; Simpson v. Pacific Mut. Life Ins. Co., 44 Cal. 139; Altschul v. Doyle, 48 Cal. 535; Marble v. Fay, 49 Cal. 585; Doherty v. Enterprise M. Co., 50 Cal. 187; Warner v. F. Thomas etc. Cleaning Works, 105 Cal. 409, 38 Pac. 960; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Gerold v. Brunswick Co., 67 Cal. 124, 7 Pac. 306; Bjorman v. Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591; Blum v. McHugh, 92 Cal. 497, 28 Pac. 592; In re Carriger, 104 Cal. 81, 37 Pac. 785; Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; Froman v. Patterson, 10 Mont. 107, 24 Pac. 692; McCauley v. Tyler, 11 Mont. 51, 27 Pac. 391; Bass v. Buker, 6 Mont. 442, 12 Pac. 922; Pratt v. Gilbert, 8 Utah, 56, 29 Pac. 965; Tousey v. Etzel, 9 Utah, 329, 34 Pac. 291; Pederson v. Seattle etc. Ry. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; State v. Mackey, 12 Or. 154, 6 Pac. 648; Cunningham v. Union Pacific Ry. Co., 4 Utah, 206, 7 Pac. 795. As to sufficient specification of insufficiency of evidence, see Smith v. Ellis, 103 Cal. 294, 37 Pac. 400; Dawson v. Schloss, 93 Cal. 200, 29 Pac. 31; Harnett v. Central Pacific R. R. Co., 78 Cal. 32, 20 Pac. 154; Brown v. Stark, 83 Cal. 636, 24 Pac. 162.

410 United States v. Duval, Gilp. 356, Fed. Cas. No. 15015. As to when verdict is against law, see Declez v. Save, 71 Cal. 552, 12 Pac. 722; Sweeney v. Central Pacific R. R. Co., 57 Cal. 15; Simmons v. Hamilton, 56 Cal. 493; Northern Ry. Co. v. Jordan, 87 Cal. 23, 25 Pac. 273.

411 Shanklin v. Hall, 100 Cal. 26, 34 Pac. 636. See Boston Tunnel Co. v. McKenzie, 67 Cal. 485, 8 Pac. 22.

dence is conflicting on the questions at issue does not prevent the trial court from exercising its discretionary power in granting a new trial.[412] If the motion be on several grounds, the court may grant it generally, without assigning specific reasons.[413]

§ 1602. Error in admitting evidence.—From the admission of improper evidence on the trial, pertinent to any material issue, unless the same be withdrawn before the submission of the cause, injury is presumed to result to the party against whom such evidence is admitted, and he is entitled to a new trial, whether the cause be submitted to a jury for a general or special verdict or to the court without the intervention of a jury.[414] Where improper evidence is submitted to the jury under objection, a new trial will be granted, unless it appears that such evidence could have had no influence prejudicial to the party objecting.[415] Injury is presumed from evidence erroneously admitted, except where it clearly appears that no injury accrued,[416] or unless it satisfactorily appears that the verdict would not have been changed.[417] And where the evidence was conflicting, the admission of any incompetent evidence which might possibly prejudice ought not to be overlooked.[418] But where the trial is before a court or referee, a new trial will not lie where there is sufficient competent evidence to justify the judgment;[419] or where the evidence conflicts with the complaint;[420] or if there is uncontradicted evidence sufficient to warrant the verdict of the jury;[421]

412 Cooper v. Spring Valley Water Works, 145 Cal. 207, 78 Pac. 654; Green v. Soule, 145 Cal. 96, 78 Pac. 337; Bernier v. Anderson, 8 Idaho, 675, 70 Pac. 1027; Harrington v. Butte etc. Min. Co., 27 Mont. 1, 69 Pac. 102.

413 Best v. City of Seattle, 50 Wash. 533, 97 Pac. 772.

414 Spanagel v. Dellinger, 38 Cal. 282; Rice v. Russell, 39 Cal. 609; Mason v. Wolff, 40 Cal. 246; Leonard v. Kingsley, 50 Cal. 628; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054.

415 Innis v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305; Santillan v. Moses, 1 Cal. 93; Trigg v. Conway, Hempst. 538, Fed. Cas. No. 14172; Walpole v. Renfroe, 16 La. Ann. 92; Consequa v. Willings, Pet. C. C. 225, Fed. Cas. No. 3128; Brown v. Cummings, 7 Allen, 507. See, also, Coghill v. Boring, 15 Cal. 213.

416 Grimes v. Fall, 15 Cal. 63; Weber v. Kingsland, 8 Bosw. 415.

417 Thompson v. Lothrop, 21 Pick. 340.

418 Whiting v. Otis, 1 Bosw. 420.

419 Melton v. Cobb, 21 Tex. 539; Holbrook v. Jackson, 7 Cush. 136.

420 Cunningham v. Kimball, 7 Mass. 65.

421 Zeigler v. Wells Fargo & Co., 28 Cal. 263; Renaud v. Peck, 2 Hilt. 137; Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217; Doane v. Baker, 6 Allen, 260; Hollinshead v. Nauman, 45 Pa. St. 140; Richardson v. Warren, 6 Allen, 552.

or if the objection was merely technical,[422] and its rejection was right, or no injustice was done by it;[423] or if it was cumulative;[424] or where it is afterwards made competent;[425] or where the fact to be proved is mere surplusage, or not material to the decision of the action;[426] or was not in issue; or where its admission has not prejudiced the case,[427] or could not have injured the defendant;[428] or does not bear upon the question decided;[429] or where the court instructs the jury to disregard such evidence;[430] or where, under the decision admitting the evidence, no evidence is shown to have been given.[431] When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial.[432] If the court erroneously rules that certain evidence is admissible, the opposite party is not prejudiced thereby, unless the ruling is followed by the introduction of the objectionable testimony.[433]

A party is not injured by a refusal to strike out objectionable testimony, if the same party afterwards introduces the same testimony, or if counsel afterwards concedes the facts stated in such testimony.[434] If the court erroneously allows respondent

422 Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217.

423 Id.

424 Id.; Smith v. Jensen, 13 Colo. 213, 22 Pac. 434.

425 Eastman v. Amoskeag Co., 44 N. H. 143, 82 Am. Dec. 201.

426 Clark v. Lockwood, 21 Cal. 220; Mills v. Barney, 22 Cal. 240; Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217.

427 Horford v. Wilson, 1 Taunt. 12; Cox v. Kitchin, 1 Bos. & Pul. 338; Allen v. Blunt, 2 Woodb. & M. 121, Fed. Cas. No. 217.

428 Dimmick v. Milwaukee R. R. Co., 18 Wis. 471.

429 Barry v. Bennett, 7 Metc. (48 Mass.) 354.

430 Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504, 85 Am. Dec. 145; Randolph v. Woodstock, 35 Vt. 291; Smith v. Whitman, 6 Allen, 562. But see Green v. Hudson River R. R. Co., 32 Barb. 25.

431 Randolph v. Woodstock, 35 Vt. 291; Fowler v. Middlesex, 6 Allen, 92.

432 Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024. See Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Wilson v. California etc. R. R. Co., 94 Cal. 166, 29 Pac. 861; Mullins v. Wieland, 68 Cal. 231, 9 Pac. 92. Compare Smith v. Ireland, 4 Utah, 187, 7 Pac. 749; Bowers v. Union Pacific R. R. Co., 4 Utah, 215, 7 Pac. 251; Lehi Irrigation Co. v. Moyle, 4 Utah, 327, 9 Pac. 867; San Gabriel Wine Co. v. Behlow, 94 Cal. 110, 29 Pac. 419; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Crystal Lake Ice Co. v. McAulay, 75 Cal. 631, 17 Pac. 924; Bernheim v. Christal, 76 Cal. 567, 18 Pac. 683; Harnett v. Central Pacific R. R. Co., 78 Cal. 31, 20 Pac. 154; Driscoll v. Market St. etc. Ry. Co., 97 Cal. 553, 33 Am. St. Rep. 203, 32 Pac. 591; O'Donnell v. Bennett, 12 Mont. 242, 29 Pac. 1044; Wallace v. Lewis, 9 Mont. 399, 24 Pac. 22.

433 Treat v. Reilly, 35 Cal. 129.

434 Id.

to introduce evidence upon matter not denied in the answer, but the appellant is not prejudiced thereby, a new trial will not be granted.[435] The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial.[436] When an objection to material evidence is improperly sustained, and the result of the trial is adverse to the party against whom the ruling is made, the ruling may be made the ground for a new trial, unless there is something in the record showing that the sustaining of the objection to the question was a harmless error.[437] It is no ground for a new trial that secondary evidence was admitted without a foundation for it being laid, if no objection was made to it,[438] or that further evidence was allowed after the testimony was closed.[439] If the court refuse to allow an amendment to the answer, but admits evidence on the point to which the amendment referred, and it appears that the amendment is immaterial, no injury results from the refusal.[440] Where a referee erred in receiving certain evidence, yet where such evidence, by legal necessity, can do no injury, it will not authorize a new trial.[441] When a witness is allowed to testify against the objection of a party to a cause, and the judge does not state the facts on which his opinion in favor of the competency of the witness depends, the parties disagreeing as to the facts, a new trial will be ordered.[442] Error in admitting evidence on behalf of the plaintiff, the only effect of which was to support an allegation of the answer, is not ground for reversal at the instance of the defendant.[443] Where error is committed in permitting the plaintiffs to ask a witness a question with a view to his impeachment, the error is harmless where the witness denies the imputed declarations, and the testimony of the impeaching witness is subsequently stricken out by the court on defendant's motion.[444] So, the erroneous admission of evidence may be cured by a subsequent instruction, given at

435 Wells v. McPike, 21 Cal. 215; Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

436 Sibley v. Leffingwell, 8 Allen, 584; Rand v. Dodge, 17 N. H. 343.

437 Cravens v. Bennett, 17 Colo. 419, 30 Pac. 61.

438 Myer v. Avery, 23 Ind. 510.

439 Mowry v. Starbuck, 4 Cal. 274; Brooks v. Crosby, 22 Cal. 42. See Howard v. Holbrook, 9 Bosw. 237.

440 Jones v. Block, 30 Cal. 227.

441 Forrest v. Forrest, 6 Duer, 145; Lowery v. Stewart, 3 Bosw. 505. But see Worrall v. Parmelee, 1 N. Y. 519, 49 Am. Dec. 350; Osgood v. Manhattan Co., 3 Cow. 612.

442 State v. Norton, 1 Winst. (N. C.) 303.

443 Hewes v. Germain Fruit Co., 106 Cal. 441, 39 Pac. 853.

444 Sears v. Seattle etc. Ry. Co., 6 Wash. 227, 33 Pac. 389, 1081.

the request of the appellant, countervailing its effect.[445] But error in admitting evidence upon a material question not in issue is not cured by amending the pleadings so as to present the issue.[446] Where the evidence is introduced without objection, new trial will not be granted on account of its incompetence.[447]

§ 1603. Error in excluding evidence.—When the court refuses to allow the introduction of proper evidence, and plaintiff becomes nonsuited, the judgment of nonsuit may be set aside and a new trial granted.[448] So, also, where all evidence offered by the plaintiff is excluded, and judgment rendered for defendant.[449] Where a portion of plaintiff's evidence was excluded, and the court of review comes to the conclusion that if the evidence excluded had been admitted plaintiff could not have recovered, a new trial will not be granted;[450] or where the evidence was afterwards admitted;[451] or if it is evident that the testimony offered could have no influence upon the verdict;[452] or where conclusive evidence on the same point was subsequently admitted.[453] A new trial will be ordered on the improper exclusion of a witness, although it does not appear probable that his testimony could have affected the result.[454] But where the excluded testimony is afterwards admitted, or the point to which it is called is explained by other evidence, the error is cured.[455] The rejection of an unimportant deposition is not of itself alone cause for a new trial.[456] A judge has not the right arbitrarily to reject evidence.[457] But where a

445 Renton v. Monnier, 77 Cal. 449, 19 Pac. 820; Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534.

446 Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240.

447 Wait v. Maxwell, 5 Pick. 217, 16 Am. Dec. 391; Rice v. Bancroft, 11 Pick. 469; Monson v. Palmer, 8 Allen, 551; Bullard v. Stone, 67 Cal. 477, 8 Pac. 17. But see, as to the proper course where the objection arises from a defect in the pleading, Carpentier v. Small, 35 Cal. 346.

448 Guffey v. Moseley, 21 Tex. 408. See Robison v. Lyle, 10 Barb. 513.

449 Moore v. Bates, 46 Cal. 29.

450 De Merle v. Mathews, 26 Cal. 455.

451 Morgan v. Reid, 7 Abb. Pr. 215; Hicks v. Whiteside, 23 Cal. 404; Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347; McKenzie v. Oregon Improvement Co., 5 Wash. 409, 31 Pac. 748; St. Kevin Min. Co. v. Isaacs, 18 Colo. 400, 32 Pac. 822.

452 Carpenter v. Norris, 20 Cal. 437; City Bank of Brooklyn v. Dearborn, 20 N. Y. 244.

453 Park Bank v. Tilton, 15 Abb. Pr. 384.

454 Brown v. Richardson, 20 N. Y. 472, 476; reversing 1 Bosw. 402. See, also, Buck v. Hermance, 1 Blatchf. 322, Fed. Cas. No. 2081.

455 People v. Woody, 48 Cal. 81; Byrne v. Jansen, 50 Cal. 624; Branson v. Caruthers, 49 Cal. 374.

456 Hill v. Meyers, 43 Pa. St. 170.

457 Prewett v. Dyer, 107 Cal. 154, 40 Pac. 105.

question asked of a witness is irrelevant and immaterial, it is not error to strike out the answer.[458] And although the ground for excluding testimony may have been an improper one, yet if any good reason exists for its exclusion, the action of the court will be sustained.[459]

§ 1604. Error of law.—It is not an error of law that the evidence is insufficient to justify a particular finding of fact; and the same is true of the verdict of a jury.[460] A new trial will not be granted for an error by which the rights of the party were not prejudiced.[461] Nor for an error favorable to the appellant.[462] A new trial will not be granted where a demurrer to a plea was erroneously sustained when defendant could have had the full benefit of the same defense under other pleas.[463] Nor upon refusal of a nonsuit, in cases where the deficiency was afterwards supplied.[464] Nor because counsel indulged in too great latitude, arguing as to inferences to be drawn from evidence.[465] If the court refuses a demand for a jury trial of issues of fact, a new trial will be granted, although the issues may have been fairly tried by the court.[466] A ruling on a demurrer to the evidence is a decision of law which is subject to reconsideration on motion for new trial.[467] The court will never grant a new trial where the decision is right upon the whole case, although the reason stated is not the true one on which the decision should have been based.[468] Nor where plaintiff could in no event recover more than nominal damages.[469] Nor on account of an erroneous ruling, when it is seen that the facts cannot be changed, and the facts

458 Mahan v. Wood, 105 Cal. 12, 38 Pac. 507.

459 Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534.

460 Smith v. Christian, 47 Cal. 18.

461 2 Gra. & W. New Trial, 603; Tyler v. Green, 28 Cal. 406, 87 Am. Dec. 130; Carpentier v. Gardiner, 29 Cal. 160; Mott v. De Reyes, 45 Cal. 379; Chipley v. Farris, 45 Cal. 527; Eckert v. Cameron, 43 Pa. St. 120; McKay v. Leonard, 17 Iowa, 569; Overland Mail etc. Co. v. Carroll, 7 Colo. 43, 1 Pac. 682.

462 Wilkinson v. Parrott, 32 Cal. 102; De Haven v. McAuley, 138 Cal. 573, 72 Pac. 152.

463 Powell v. Asten, 36 Ala. 140.

464 Schenectady etc. Co. v. Thatcher, 11 N. Y. 102; Colvin v. Burnet, 2 Hill, 620; Kent v. Harcourt, 33 Barb. 491.

465 United States v. Flowery, 1 Sprague, 109, Fed. Cas. No. 15122.

466 Treadway v. Wilder, 12 Nev. 108.

467 Buoy v. Clyde Milling etc. Co., 68 Kan. 436, 75 Pac. 466.

468 Munroe v. Potter, 22 How. Pr. 49. See, also, Kidd v. Teeple, 22 Cal. 255.

469 Hopkins v. Grinnell, 28 Barb. 533; McConihe v. New York etc. R. R. Co., 20 N. Y. 495, 75 Am. Dec. 420.

proved are conclusive in support of the judgment.[470] Nor where the court erroneously submitted a matter of law to the jury, and the verdict decided it correctly.[471] But where a question of fact, which ought to have been submitted to the jury, was decided by the court, a new trial will be granted,[472] unless submitted to without objection.[473] If the court makes a ruling during the progress of a trial, the party in whose favor the ruling is, is entitled to have the case decided according to the ruling, provided that if the ruling had been against him he might have been able to remove the objection made by the other party.[474]

§ 1605. **Error in instructions.**—Where an erroneous instruction has been given, which may have influenced the verdict, a new trial will be granted;[475] for example, instruction on matter of fact.[476] If the court erroneously directs a verdict on the pleadings, instead of allowing the complaint to be amended to conform to the proof, a new trial should be granted.[477] But where no other conclusion than that directed by the court could be arrived at from the evidence, it is error without prejudice, and therefore not ground for reversal.[478] Or where the judge refused instructions on a matter of law.[479] But where incorrect instructions are given in favor of defendant, he cannot complain of the error.[480] Or an error which does not militate against appellant,[481]

470 Brown v. Bowen, 30 N. Y. 519, 86 Am. Dec. 406.

471 Stokes v. Arey, 8 Jones L. (53 N. C.) 66.

472 San Francisco v. Clark, 1 Cal. 386.

473 Clark v. Mayor of New York, 24 How. Pr. 333.

474 Carpentier v. Small, 35 Cal. 346.

475 Slaughter v. Fowler, 44 Cal. 195; Younge v. Pacific Mail S. S. Co., 1 Cal. 353; Miller v. Stewart, 24 Cal. 502; Gale v. Wells, 12 Barb. 85; Hunter v. Ousterhoudt, 11 Barb. 33; Scott v. Lunt, 7 Pet. 596, 8 L. Ed. 797; Rochell v. Phillips, Hempst. 22, Fed. Cas. No. 11974a; United States v. Beatty, Hempst. 487, Fed. Cas. No. 14555.

476 Pico v. Stevens, 18 Cal. 376.

477 Wash. Bal. Codes, § 4950; Ernst v. Fox, 26 Wash. 526, 67 Pac. 258.

478 Pico v. Stevens, 18 Cal. 376. As to erroneous instruction ground for reversal, see Haight v. Vallet, 89 Cal. 245, 23 Am. St. Rep. 465, 26 Pac. 897; Zaro v. Dakan, 76 Cal. 565, 18 Pac. 680; Cleary v. City R. R. Co., 76 Cal. 240, 18 Pac. 269; Rara Avis Min. Co. v. Bouscher, 9 Colo. 385, 12 Pac. 433; Nuckolls v. Gaut, 12 Colo. 361, 21 Pac. 41; Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391; Buchtel v. Evans, 21 Or. 309, 28 Pac. 67; Flick v. Gold Hill etc. Min. Co., 8 Mont. 298, 20 Pac. 807.

479 Emerson v. Hogg, 2 Blatchf. 1, Fed. Cas. No. 4440.

480 Gaven v. Dopman, 5 Cal. 342; Wilkinson v. Parrott, 32 Cal. 102.

481 People v. Moore, 8 Cal. 94.

or injure him.[482] Or a mere want of perspicuity in framing the instruction.[483] A new trial will not be granted on the ground of erroneous instructions as to measure of damages, if it appear by bill of exceptions that the damages assessed were not too great.[484] Or where, notwithstanding such instruction, the jury came to the proper understanding, and rendered a correct verdict.[485] When a single statement in a judge's charge contains two propositions, one of which is erroneous, the court will order a new trial if it appear that the jury was misled thereby.[486] The whole charge to the jury should be taken together, and if the case appears to have been fairly presented to the jury, the verdict will not be disturbed.[487] Where several defenses are pleaded, either of which is good in law, and the court errs in its instructions as to one of the defenses, unless it appear that the verdict was rendered on a defense in relation to which no error was committed, a new trial will be granted.[488] So where the verdict involves more than one issue, if the charge is erroneous as to either issue.[489] Or if there is some evidence, although it may have been slight, upon which the instructions were based.[490] Wherever the court, on a supposed state of facts, instructs the jury if they so find the facts to render a verdict for the plaintiff, when the instruction should have been to find in that event a verdict for the defendant, the remedy, if no exception is taken, is to move on a case for a new trial.[491] If a party desires to call the attention of the judge to the fact that he was mistaken as to certain evidence having been given as stated in the charge, he should do so directly and

482 Thompkins v. Mahoney, 32 Cal. 231; Fagan v. Williamson, 8 Jones L. (53 N. C.) 433; Hook v. Craghead, 35 Mo. 380; Winnas v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Bassett v. Inman, 7 Colo. 270, 3 Pac. 383.

483 People v. Moore, 8 Cal. 94; McKinney v. Smith, 21 Cal. 374; Hooksett v. Amoskeag etc. Co., 44 N. H. 105.

484 Couillard v. Duncan, 6 Allen, 440.

485 Haskell v. McHenry, 4 Cal. 411; Pratte v. Judge Court Com. Pleas, 12 Mo. 194; Marcly v. Shults, 29 N. Y. 346.

486 Green v. Hudson River R. R. Co., 32 Barb. 25; Anderson v. Bartels, 7 Colo. 256, 3 Pac. 225.

487 Carrington v. Pacific Mail S. S. Co., 1 Cal. 475; Dwinelle v. Henriques, 1 Cal. 387; Brooks v. Crosby, 22 Cal. 42; People v. Cleveland, 49 Cal. 578; People v. Dennis, 39 Cal. 625; Burton v. Merrick, 21 Ark. 357; People v. Biggins, 65 Cal. 564, 4 Pac. 570; People v. Turcott, 65 Cal. 126, 3 Pac. 461; People v. McDowell, 64 Cal. 467, 3 Pac. 124.

488 Wiseman v. McNulty, 25 Cal. 234.

489 Whitacre v. Culver, 8 Minn. 133.

490 Perlberg v. Gorham, 10 Cal. 120.

491 Brush v. Kohn, 9 Bosw. 589.

in a way to inform the judge thereof, and request him to admonish the jury that in fact no such evidence had been given, and if the judge from misapprehension refuse to correct the error, the party prejudiced thereby would be entitled to relief on his motion for a new trial on a case.[492] If a fact is improperly found, the proper remedy is a new trial.[493] Though the instruction given at the request of a party was inaccurate, yet if it was not excepted to, and the jury did not find in conformity to it, a new trial should not be granted.[494] Where an erroneous instruction is given to the jury the judgment will be reversed unless it appear that appellant was not prejudiced thereby.[495] The judge has a right to aid the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead or control their deliberations; that which a jury have a right to decide ought to be so submitted as to leave them free to decide it either way.[496]

§ 1606. **Error as to one affects all.**—If an order or decision of the court, made on the motion or at the request of one of several defendants, be erroneous, the responsibility will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily have an application only to particular defendants or their interests.[497]

§ 1607. **Error in findings.**—Where certain findings are unsupported by any evidence, such findings should be set aside and a new trial granted.[498] Where the value of certain bonds is material on the question of their sale being ratified by the bank and on whether the bank president should be charged with actual or constructive fraud, a new trial should be granted if there is not sufficient evidence to support a finding made thereon by the jury.[499] If on the trial the court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and upon re-

492 Varnum v. Taylor, 10 Bosw. 148.

493 North American Oil Co. v. Forsyth, 48 Pa. St. 291.

494 See Rogers v. Murray, 3 Bosw. 357. As to necessity of excepting to an error in the instructions to the jury, see Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846.

495 Richardson v. McNulty, 24 Cal. 339.

496 Mohney v. Evans, 51 Pa. St. 80. See Battersby v. Abbott, 9 Cal. 565; Alwin v. Ulmer, 12 Mass. 22.

497 Judson v. Malloy, 40 Cal. 307.

498 Smith v. Athern, 34 Cal. 506; Felton v. Le Breton, 92 Cal. 457, 28 Pac. 490.

499 Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498.

examination, on motion for a new trial, finds that a fact essential to plaintiff's recovery is not proved, a new trial should be granted.[500] If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it and the findings of the fact in relation to it by the court.[501] If the findings follow the issues, and a demurrer would not be sustained to the complaint, judgment will not be arrested on the findings;[502] nor for inaccuracy in the language of a finding sufficiently distinct as to a material question involved.[503]

§ 1608. Exceptions must be taken at the trial.—Exceptions must be taken to the ruling of the court.[504] Where a party wishes to put on record, for purposes of review, the decision of the court on a matter of fact, the only mode is to request that written findings be filed, and, on failure or refusal to do so, to except for want of findings. A decision by the court on a matter of fact cannot be established by affidavit on motion for new trial.[505] If an objection is taken to evidence by counsel, and the objection is overruled by the court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling.[506] If incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for nonsuit, and on motion for new trial.[507] The nature of the objections to the admission of evidence must be shown.[508] An erroneous instruction is an error of law occurring at the trial, and, unless excepted to, is not ground for a new trial.[509]

§ 1609. Excessive damages.—Courts will grant a new trial where the damages are unjustifiable or grossly inconsistent with

500 Hawkins v. Reichert, 28 Cal. 534.

501 McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Smith v. Owens, 21 Cal. 11. A judgment based upon contradictory findings is a decision against law, for which a new trial may be had. Langan v. Langan, 89 Cal. 186, 26 Pac. 764.

502 Millard v. Hathaway, 27 Cal. 119.

503 McKinney v. Smith, 21 Cal. 374.

504 McCloud v. O'Neall, 16 Cal. 392; Russel v. Union Ins. Co., 1 Wash. C. C. 440, Fed. Cas. No. 12147; Farmers' Loan etc. Co. of New York v. McKinney, 6 McLean, 1, Fed. Cas. No. 4667; Leahy v. Southern Pacific R. R. Co., 65 Cal. 150, 3 Pac. 622; Evans v. Jones, 10 Utah, 182, 37 Pac. 262.

505 Sanchez v. McMahon, 35 Cal. 218.

506 Turner v. Tuolumne County Water Co., 25 Cal. 404.

507 Janson v. Brooks, 29 Cal. 214.

508 Cox v. Jackson, 6 Allen, 108.

509 St. Louis & S. F. R. R. Co. v. Werner, 70 Kan. 190, 78 Pac. 410.

the facts of the case.[510] The mere fact that damages are excessive is not a ground for new trial; they must appear to have been given under the influence of passion or prejudice,[511] or by error made in calculation.[512] But where the verdict is for a sum greatly disproportionate to the injury, that is of itself evidence that it was rendered under the influence of passion or prejudice.[513] A jury not being advised as to any basis for estimate of expectancy of life of the plaintiff, and thus fixing the verdict at seven thousand five hundred dollars, the court may remit five thousand dollars thereof and enter judgment for two thousand five hundred dollars, and refuse a new trial.[514] In case the verdict exceeds the damages claimed in the complaint, a new trial will be granted.[515] There is no reason for holding the amount of damages excessive as ground for new trial where the sum allowed is less than that claimed in the complaint, and the uncontradicted evidence of the plaintiff shows that he suffered twice as much damage as that claimed.[516] But a new trial will not be granted where the verdict exceeds the amount of damages laid in the writ, but not the amount laid in the declaration.[517] But the excess may be remitted and the judgment stand.[518] So, also, in other cases of excessive damages.[519] This, however, is in the discretion of the

510 McDaniel v. Baca, 2 Cal. 326, 56 Am. Dec. 339; Potter v. Seale, 5 Cal. 410. See, also, Pleasants v. North Beach etc. R. R. Co., 34 Cal. 586; Gleason v. Inhabitants of Bremen, 50 Me. 222; Scherpf v. Szadeczky, 1 Abb. Pr. 366; Blum v. Higgins, 3 Abb. Pr. 104; Fry v. Bennett, 9 Abb. Pr. 45; Knight v. Wilcox, 18 Barb. 212; Clapp v. Hudson River R. R. Co., 16 Barb. 461; Hamilton v. Third Ave. R. R. Co., 48 How. Pr. 50; Duffy v. Chicago etc. Ry. Co., 34 Wis. 188; Patten v. Chicago etc. R. R. Co., 36 Wis. 413.

511 Missouri etc. R. R. Co. v. Weaver, 16 Kan. 456; Cal. Code Civ. Proc., § 657, subd. 5.

512 Lewis v. Northern Pacific Ry. Co., 36 Mont. 207, 92 Pac. 469.

513 Kinsey v. Wallace, 36 Cal. 481; McCarty v. Fremont, 23 Cal. 197. Compare Benjamin v. Stewart, 61 Cal. 605; Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. 601; Gorman v. Southern Pacific Co., 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112.

514 City of Argentine v. Bender, 71 Kan. 422, 80 Pac. 935.

515 Palmer v. Reynolds, 3 Cal. 396; McIntire v. Clark, 7 Wend. 330. See, also, Dox v. Dey, 3 Wend. 356; Corning v. Corning, 6 N. Y. 97; Decker v. Parsons, 11 Hun, 295; Manson v. Robinson, 37 Wis. 339; Garlick v. Bower, 62 Cal. 65; Vanderford v. Foster, 62 Cal. 179. Contra: Webb v. Thompson, 23 Ind. 428.

516 Perira v. Smith, 79 Cal. 232, 21 Pac. 739.

517 Roderick v. Baltimore etc. R. R. Co., 7 W. Va. 54.

518 Pierce v. Payne, 14 Cal. 420; Costello v. Scott (Nev.), 93 Pac. 1; McOwen v. Seattle El. Co., 48 Wash. 362, 93 Pac. 518; Manson v. Robinson, 37 Wis. 339.

519 McLaughlin v. Wash. County Mut. Ins. Co., 23 Wend. 525; Jansen v. Ball, 6 Cow. 628; Diblin v. Mur-

court.[520] But although there are cases in which the courts have reduced the verdict where the damages were excessive, it would seem to be doubtful practice in actions for personal injuries.[521] The offer to remit comes too late after new trial granted.[522] In actions for personal torts, the law fixes no precise rule of damages, but leaves their assessment to the unbiased judgment of the jury; and the verdict will not be disturbed on the ground of excessive damages unless the amount is so disproportionate to the injury as to justify the conclusion that the verdict is not the result of the cool, dispassionate consideration of the jury.[523]

§ 1610. **Exemplary or punitive damages.**—Where punitive damages are allowable, they should bear proportion to the actual damage; and if they fail to do so, whether too small or too great, the court should award a new trial.[524] The question whether the acts of the defendant resulting in personal injuries to the plaintiff were accompanied by oppression, fraud, or malice, so as to authorize the giving of exemplary damages, is a fact to be determined by the jury from the evidence before it, and where there is a substantial conflict of evidence thereon, its verdict will not be interfered with upon appeal. But the trial court may, if, in its opinion, the evidence was insufficient to show that there had been any fraud, oppression, or malice on the part of the defendant,

phy, 3 Sandf. 19; Clapp v. Hudson River R. R. Co., 19 Barb. 461; Murray v. Hudson River R. R. Co., 47 Barb. 196; Collins v. Albany etc. R. R. Co., 12 Barb. 492; Devore v. McDermitt, 47 Ind. 234; Scott v. Lilienthal, 9 Bosw. 224.

520 Clark v. Huber, 20 Cal. 198; Davis v. Southern Pacific Co., 98 Cal. 13, 32 Pac. 646; Winter v. Shoudy, 9 Wash. 52, 36 Pac. 1049. See Gardner v. Tatum, 81 Cal. 370, 22 Pac. 880.

521 Gale v. New York Cent. etc. R. R. Co., 53 How. Pr. 385. But see Johnson v. Root, 2 Fish. Pat. Cas. 291, 2 Cliff. 108, Fed. Cas. No. 5409.

522 Hill v. Newman, 47 Ind. 187.

523 Aldrich v. Palmer, 24 Cal. 513; Wheaton v. North Beach etc. R. R. Co., 36 Cal. 591; Myers v. City etc. San Francisco, 42 Cal. 215; Russell v. Dennison, 45 Cal. 337; Lee v. Southern Pacific R. R. Co., 101 Cal. 118, 35 Pac. 572; Fisher v. Southern Pacific R. R. Co., 89 Cal. 399, 26 Pac. 894; Griffiths v. Clift, 4 Utah, 462, 11 Pac. 609; Coleman v. Southwick, 9 Johns. 45, 6 Am. Dec. 253; Southwick v. Stevens, 10 Johns. 443; McConnel v. Hampton, 12 Johns. 234; Sargent v. Dennison, 5 Cow. 106; Moody v. Baker, 5 Cow. 351; Travis v. Barger, 24 Barb. 614; Parker v. Lewis, Hempst. 72, Fed. Cas. No. 10741a; Palmer v. Fiske, 2 Curtis, 14, Fed. Cas. No. 10691; Swann v. Bowie, 2 Cranch C. C. 221, Fed. Cas. No. 13672; St. Paul v. Kuby, 8 Minn. 154; Mississippi Cent. R. R. Co. v. Caruth, 51 Miss. 77; Chicago etc. R. R. Co. v. Wilson, 63 Ill. 167.

524 Mobile etc. R. R. Co. v. Ashcraft, 48 Ala. 15.

grant a new trial, notwithstanding the verdict of the jury.[525] If the court instruct the jury that they "cannot find vindictive damages," and the jury, notwithstanding the instruction, do find such damages, that in itself is not sufficient ground for a new trial, if the verdict be not excessive.[526]

§ 1611. **Erroneous rule in assessing damages.**—Where the jury adopt a rule of compensation not justified by the evidence, and at variance with the instructions of the court, a new trial should be granted.[527] In a case of infringement of patent, if the court instruct the jury that if their verdict be for plaintiff it must be for nominal damages only, and they return a verdict for five hundred dollars, it is held that while errors of this description may sometimes be obviated by allowing the prevailing party to remit the excess when the court is satisfied that the error arose from oversight or inadvertence, yet when the finding is not only contrary to the evidence, but in direct contravention of the charge of the court, the verdict will be set aside and a new trial granted.[528] Where, in addition to a general verdict, special questions of fact are answered by the jury as to the items of damages, and it is evident that the jury erroneously included a certain item of a definite amount, which was carried into the general verdict, the court may refuse a new trial, and award judgment for the amount of the general verdict, after deducting the part erroneously included in the general verdict;[529] but where one of the items is improper, and its amount cannot be determined from the general verdict, the verdict should be set aside and a new trial granted.[530]

§ 1612. **Facts must be shown.**—The facts should be stated, from which the court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim.[531] If the statement shows that too high a rate of interest was allowed by the jury upon an account sued on, for a part of

525 Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024.

526 Dye v. Denham, 54 Ga. 224. But see Wilson v. Fitch, 41 Cal. 363.

527 Karr v. Parks, 44 Cal. 50.

528 Johnson v. Root, 2 Fish. Pat. Cas. 291, 2 Cliff. 108, Fed. Cas. No. 4509. See Whitney v. Emmett, Baldw. 325, Fed. Cas. No. 17585.

529 Kansas City M. & O. Ry. v. Turley, 71 Kan. 256, 80 Pac. 605.

530 Lathrope v. Flood, 135 Cal. 458, 67 Pac. 683, 57 L. R. A. 215.

531 Patterson v. Ely, 19 Cal. 28.

the time, a new trial will be granted unconditionally, unless it appears that plaintiff had not kept his account for the residue of the time upon the erroneous basis of interest, and he will consent to remit the excess.[532] Circumstances must show that the jury have made some mistake in the rules of law applicable, or in their mode of computation, or that they have been actuated by passion or prejudice, or some improper feeling.[533]

§ 1613. Inadequate damages.—A new trial will be granted for inadequacy of damages as well as for excessive damages,[534] especially where the amount shows a compromise.[535] The Kansas code provision, prohibiting the granting of new trial on account of the smallness of the damages, in an action for personal injuries, denies the right of new trial for such cause in any action for personal injuries.[536]

§ 1614. Insufficient grounds.—It is no ground for a new trial of the issues of fact that the judgment is broader than the facts alleged and found would justify. Such an error does not affect the findings where it occurred in entering the judgment subsequent to the findings.[537] The court will not grant a new trial on the ground of excessive damages when the verdict was in accordance with the direction of the court.[538] Where the defendant leaves the matter to general inference;[539] or where the claim for damages rests entirely on the uncontroverted allegations of the complaint, the judgment will not be disturbed;[540] or where defendants admit that the amount claimed is correct;[541] or that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was

532 Clark v. Gridley, 35 Cal. 398.

533 Aldrich v. Palmer, 24 Cal. 513; Boyce v. California Stage Co., 25 Cal. 460.

534 Hall v. Bark Emily Banning, 33 Cal. 522; Mariani v. Dougherty, 46 Cal. 26; Wolford v. Lyon etc. Min. Co., 63 Cal. 483; Bennett v. Hobro, 72 Cal. 178, 13 Pac. 473; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; McDonald v. Walter, 40 N. Y. 551; Richards v. Sandford, 2 E. D. Smith, 349; Robbins v. Hudson River R. R. Co., 7 Bosw. 1. See Moore v. Wood, 19 How. Pr. 405; Taylor v. Howser, 12 Bush. 465.

535 Falvey v. Stanford, L. R., 10 Q. B. 54.

536 Kan. Code Civ. Proc., § 307; Metropolitan St. Ry. v. O'Neill, 68 Kan. 252, 74 Pac. 1105.

537 Shepard v. McNeil, 38 Cal. 72.

538 Stimpson v. The Railroads, 1 Wall. Jr. 164, Fed. Cas. No. 13456.

539 Stephens v. Felt, 2 Blatchf. 37, Fed. Cas. No. 13368.

540 Patterson v. Ely, 19 Cal. 28.

541 Rowe v. Smith, 10 Bosw. 268.

claimed by the *ad damnum* in the declaration, there is not sufficient error to warrant a new trial.[542]

§ 1615. Libel and slander.—It is only in rare cases, and where the damages are obviously and grossly excessive, that a new trial will be granted in a case of libel or slander.[543] But in action for libel, if there is no proof of malice, and the publication is made in the usual course of defendant's business as public journalist, in the full belief of the truth of the article after careful inquiry from an apparently reliable source, the jury should not award punitive damages, and to do so would be a ground for new trial.[544] In an action for libel, the question of damages is for the jury, and the court cannot assume, as a matter of law, that the plaintiff is entitled to only nominal damages.[545]

§ 1616. Legal effect of evidence.—But where the jury acted under a mistaken impression as to the legal effect of evidence, or in a total disregard of it, a new trial will be granted.[546] A new trial will not be granted on the affidavits of jurors that the jury misapprehended the testimony, where no reasonable ground for such misapprehension appears.[547]

§ 1617. New trial will be granted.—Where an attorney appears and conducts the defense, the remedy of defendant is by motion for a new trial; but where such attorney appears without authority and by mistake, the remedy may be by motion for relief from the judgment.[548] Where judgment is founded in part upon a betting contract, a new trial will be granted;[549] or where the referee decided against the weight of evidence, and erred in the application of the rules of law,[550] or the evidence is overwhelm-

542 Huff v. Hutchinson, 14 How. 586, 14 L. Ed. 553.

543 Root v. King, 7 Cow. 613; Tillotson v. Cheetham, 2 Johns. 63; Cook v. Hill, 3 Sandf. 341; Ostrom v. Calkins, 5 Wend. 263; Kyckman v. Parkins, 9 Wend. 470; Lowe v. Herald Co., 6 Utah, 175, 21 Pac. 991.

544 Wilson v. Fitch, 41 Cal. 363. See, also, Potter v. Thompson, 22 Barb. 87. Compare Mowry v. Raabe, 89 Cal. 606, 27 Pac. 157; Childers v. San Jose Mercury, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903.

545 Lick v. Owen, 47 Cal. 252; Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392.

546 Minturn v. Burr, 20 Cal. 48; Todd v. Boone Co., 8 Mo. 431; Fulkerson v. Bollinger, 9 Mo. 838; Wilkinson v. Greeley, 1 Curtis, 63, Fed. Cas. No. 17671; Moran v. Bogert, 16 Abb. Pr. (N. S.) 303.

547 Jack v. Naber, 15 Iowa, 450; Moffit v. Rogers, 15 Iowa, 453.

548 Cal. Code Civ. Proc., § 473; McKinley v. Tuttle, 34 Cal. 235.

549 Sisk v. Evans, 8 Mo. 52.

550 Brown v. Penfield, 24 How. Pr. 64.

ingly against the finding.[551] It is error when a particular fact in a cause is found by a jury to enter judgment for the party against whom it was found, on the ground that the evidence was insufficient to establish it. The proper remedy is a new trial.[552] Where the finding is opposed to the evidence, a new trial will be granted;[553] but it must be palpably so;[554] or not sustained by the evidence;[555] or where the evidence has failed to support several material allegations of the complaint;[556] or where the findings are not warranted by the evidence.[557] This rule applies to law and equity cases alike,[558] and to findings by referees.[559] But the evidence must be such that if the questions had been submitted to a jury the court would set aside the verdict as contrary to evidence;[560] or where the verdict is obtained on improper or incompetent evidence, but it must be objected to at the time to constitute it a ground for new trial;[561] or where there is no evidence upon a point essential to sustain the verdict;[562] or an essential finding of the court.[563] A verdict for a tenant claiming title by twenty years' possession cannot be sustained without evidence that his possession was adverse to the title of the true owner.[564] So, also, where a verdict is void for repugnancy or uncertainty;[565]

551 Carpentier v. Gardiner, 29 Cal. 164; Branson v. Caruthers, 49 Cal. 375. See, also, Walsh v. Hill, 41 Cal. 571; Guerrero v. Ballerino, 48 Cal. 118.

552 North American Oil Co. v. Forsyth, 48 Pa. St. 291. See Rudolph v. North, 6 Dak. 79, 50 N. W. 487.

553 Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Lyle v. Rollins, 25 Cal. 437; Slocum v. Lurty, Hempst. 431, Fed. Cas. No. 12949; Zantzinger v. Weightman, 2 Cranch C. C. 478, Fed. Cas. No. 18202; Wilson v. Janes, 3 Blatchf. 227, Fed. Cas. No. 17811.

554 Hunt v. Hunt, 3 B. Mon. 575.

555 Cox v. Hamilton, 21 Tex. 777; Pederson v. Seattle etc. Ry. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665.

556 Watkins v. Rogers, 21 Ark. 298.

557 Bolton v. Stewart, 29 Cal. 615. See, also, Appeal of Piper, 32 Cal. 530; affirmed in Appeal of Brooks, 32 Cal. 559.

558 Doe v. Vallejo, 29 Cal. 386.

559 Brady v. Brown, 20 Cal. 520; Cappe v. Brizzolara, 19 Cal. 607; Brown v. Penfield, 24 How. Pr. 64.

560 Moore v. Murdock, 26 Cal. 524.

561 McCloud v. O'Neall, 16 Cal. 392; Hahn v. Van Doren, 1 E. D. Smith, 411; Anderson v. Busteed, 5 Duer, 485; Travis v. Barger, 24 Barb. 614; Weeks v. Lowerre, 8 Barb. 530; Clark v. Crandall, 3 Barb. 612; Vallance v. King, 3 Barb. 548.

562 Cummins v. Scott, 20 Cal. 83; Jackson v. Sacramento R. R. Co., 23 Cal. 268; Doll v. Anderson, 27 Cal. 250; White v. Clayes, 32 Ill. 325; Rathbone v. Stanton, 6 Barb. 141; Bailey v. Ellis, 21 Ark. 488; Backus v. Clark, 1 Kan. 303, 83 Am. Dec. 437; Wright v. Orient Ins. Co., 6 Bosw. 269. Compare Kinsman v. New York Mut. Ins. Co., 5 Bosw. 460.

563 Smith v. Athearn, 34 Cal. 506; Himmelmann v. Spanagel, 39 Cal. 389; Moss v. Atkinson, 44 Cal. 16.

564 Eaton v. Jacobs, 49 Me. 559.

565 Stearns v. Barrett, 1 Mason,

or where plaintiff claims on two distinct grounds, and some of the jury might have decided on one and some on the other;[566] or where several counts are abandoned, and the verdict is rendered upon two counts which do not lay a foundation for the damages found by the jury;[567] or if one of the counts is defective, or an error has been committed as to one of them.[568]

§ 1618. New trial refused.—A new trial should be refused when it is made apparent to the court that it would be unavailing.[569] Counsel must be allowed some latitude in argument, and illogical reasoning or incorrect inferences constitute no ground for a new trial.[570] An order of the court made before trial is not an error which can be made a ground for a new trial.[571] Nor is an erroneous ruling that works no prejudice to the party complaining cause for a new trial.[572] A new trial cannot be had in cases of default.[573] Where all the facts are agreed upon, there is no issue of fact to be re-examined, and no ground for a new trial.[574] A new trial will not be granted on the ground that certain findings are not within the issues raised by the pleadings, when the action was tried without objection to the sufficiency of the pleadings to raise such issues, and the findings are justified by the evidence.[575] Nor will a new trial be granted merely because of an unnecessary and immaterial statement in the conclusions of law.[576] Insufficiency of the evidence to justify the judgment, and objection to the judgment, as being contrary to law, are not grounds upon which a motion for a new trial can be granted.[577] Failure of the trial judge to file his decision with the clerk within thirty days after the submission of the cause is not

153, Fed. Cas. No. 13337. See Thompson v. Carberry, 2 Cranch C. C. 39, Fed. Cas. No. 13946.

566 Biggs v. Barry, 2 Curtis, 259, Fed. Cas. No. 1402.

567 Jones v. Vanzandt, 2 McLean, 611, Fed. Cas. No. 7502.

568 Wilson v. Tatum, 8 Jones L. (53 N. C.) 300; Middlesex Canal v. McGregore, 3 Mass. 124. See, also, United States v. Smith, 3 Blatchf. 255, Fed. Cas. No. 16320.

569 Tolmie v. Dean, 1 Wash. T. 46.

570 Sears v. Seattle etc. Ry. Co., 6 Wash. 227, 33 Pac. 389, 1081.

571 Powder River Cattle Co. v. Commrs. Custer County, 9 Mont. 145, 22 Pac. 383.

572 Newberg v. Farmer, 1 Wash. T. 182. See Higley v. Gilmer, 3 Mont. 438.

573 Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624.

574 Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364.

575 Moore v. Campbell, 72 Cal. 251, 13 Pac. 689.

576 People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481.

577 Curtis v. Walling, 2 Idaho, 383, 18 Pac. 54. See, also, Shanklin v.

ground for a new trial.[578] A new trial will not be ordered by the supreme court of New Mexico on the application of a plaintiff in error, on the ground that by the resignation of the judge before whom the cause was tried he has lost his right to have the judgment reviewed, when both the record and bill of exceptions have been struck from the files for the reason of not being signed and sealed by the judge who tried the cause.[579] An erroneous ruling on a demurrer to a pleading is not an error for which a new trial will be granted under the Wyoming statute.[580]

§ 1619. Prejudice of jurors.—The verdict cannot be set aside on the ground that the personnel of the defendant, a corporation composed of foreign stockholders, influenced the jury.[581]

§ 1620. Specification of errors.—Specifications in a statement of "particulars in which the court erred" cannot be considered as specifications in which the evidence is insufficient.[582] But it need not point out the particulars in which the evidence is insufficient.[582a] Errors in law must be specified in the statement, in case they are relied upon, or it is error to grant a new trial on that ground.[583] Where a statement on motion for a new trial fails to specify wherein the evidence is insufficient to justify the decision, such insufficiency, as a ground of the motion, will be disregarded.[584] It must specify the particulars in which the evidence is alleged to be insufficient,[585] and if the objection to the verdict is that it is against the weight of evidence, must set forth all the testimony.[586] But the presumption is that the statement contains

Hall, 100 Cal. 26, 34 Pac. 636; Pierce v. Willis, 103 Cal. 91, 36 Pac. 1080.

578 McLennan v. Bank, 87 Cal. 569, 25 Pac. 760.

579 Wheeler v. Pick, 4 N. Mex. 149 (303), 13 Pac. 217.

580 Wyo. Rev. Stats., § 2652; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71.

581 Hough v. Grant's Pass Power Co., 41 Or. 531, 69 Pac. 655.

582 Smith v. Christian, 47 Cal. 18; Bryan v. Bryan, 137 Cal. xix, 70 Pac. 304; Holmes v. Hoppe, 140 Cal. 212, 73 Pac. 1002.

582a Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58; Di Nola v. Allison, 143 Cal. 106, 76 Pac. 976.

583 McWilliams v. Herschman, 5 Nev. 263.

584 Robson v. Colson, 9 Idaho, 215, 72 Pac. 951; King v. Lincoln, 26 Mont. 157, 66 Pac. 836; Sanchez v. McMahon, 35 Cal. 218; Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30; Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Gilberson v. Miller etc. Smelting Co., 4 Utah, 46, 5 Pac. 699.

585 Love v. Sierra Nevada Lake Water etc. Co., 32 Cal. 639, 91 Am. Dec. 602; Elder v. Shaw, 12 Nev. 78. See Bailey v. Papina, 20 Nev. 177, 19 Pac. 33.

586 Libby v. Dalton, 9 Nev. 23; Dawley v. Hovious, 23 Cal. 103.

all the evidence relating to the point specified, although the record does not affirmatively show that such is the case.[587] Where the statement on motion for a new trial did not contain that part of the evidence upon the sufficiency of which the truth of implied findings of fact depended, but showed merely that the moving party at the trial "introduced evidence tending to prove" a state of facts adverse to those thus impliedly found, and the express findings were clearly sustained by the evidence set out in the statement, it was held that the statement was insufficient to show the moving party entitled to a new trial, because it did not appear that said evidence which "tended to prove" amounted in fact to proof of said state of facts.[588] If the moving party, on motion for new trial, intends to rely on the point that the finding of fact is contrary to the evidence, he should specify in his statement wherein such finding is not justified by the evidence. It is not sufficient for him to state generally that the evidence is insufficient to justify the findings.[589]

In Montana, the statement must specify the particulars in which the evidence is insufficient.[590]

While specifications of errors should be arranged separately, under appropriate headings, the absence of such or any headings is not a fatal defect; nor is it a fatal defect where certain specifications of errors are given the wrong title.[591]

§ 1621. **Verdict against law.**—A verdict against the instructions of the court should be set aside.[592] A jury is bound to take the law from the court, and cannot disregard an instruction upon that subject, however erroneous it may be.[593] A verdict of a jury in disobedience to the instructions of the court upon a point of law is a verdict against law, and for that reason should be set aside without further consideration.[594] An averment that the verdict is against law is not sustained by showing that it is unsupported by the evidence.[595]

587 Hidden v. Jordan, 28 Cal. 301; Clark v. Gridley, 35 Cal. 403.

588 Morrill v. Chapman, 35 Cal. 85.

589 Beans v. Emanuelli, 36 Cal. 117.

590 Finlen v. Heinze, 28 Mont. 548, 73 Pac. 123; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

591 Gillies v. Clark Fork Coal Min. Co., 32 Mont. 320, 80 Pac. 370.

592 Farley v. Budd, 14 Iowa, 289.

593 Sweetman v. Prince, 62 Barb. 256; Clark v. Richards, 3 E. D. Smith, 89.

594 Emerson v. County of Santa Clara, 40 Cal. 543.

595 Brumagim v. Bradshaw, 39 Cal. 35.

§ 1622. Weight of evidence.—In some extraordinary cases where the verdict of a jury is clearly against the weight of evidence, a new trial will be awarded;[596] but the supreme court will not interfere with a verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases.[597] To justify the court in setting aside the verdict as against the weight of evidence, the court should be brought to the irresistible conclusion that the verdict was not the free, sound, and unbiased exercise of judgment on the part of the jury and that manifest injustice would result.[598] Where the court before which the case is tried is not satisfied with the verdict, and is convinced that it is clearly against the weight of evidence, it should grant a new trial, although there may be some conflict in the testimony.[599] And where there is a conflict, and the trial court grants a new trial, it will be presumed on appeal that the court below was of opinion that the evidence preponderated against the verdict,[600] even though the judge who granted the new trial is different from the

596 Bagley v. Eaton, 8 Cal. 159; Hill v. Smith, 32 Cal. 166; Hartt v. Leavenworth, 11 Mo. 629; Dolsen v. Arnold, 10 How. Pr. 528; Heritage v. Hall, 33 Barb. 347; Smith v. Tiffany, 36 Barb. 23; Coddington v. Carnley, 2 Hilt. 528; State v. Elliott, 15 Iowa, 72; Edmiston v. Garrison, 18 Wis. 594; Gaines v. Forcheimer, 9 Fla. 265; Slocomb v. Lurty, Hempst. 431, Fed. Cas. No. 12949; Zantzinger v. Weightman, 2 Cranch C. C. 478, Fed. Cas. No. 18202; Wilson v. Janes, 3 Blatchf. 227, Fed. Cas. No. 17811.

597 See Treat v. Reilly, 35 Cal. 129; Kimball v. Gearhart, 12 Cal. 27; White v. Leszynsky, 14 Cal. 167; Bensley v. Atwill, 12 Cal. 240; Ritter v. Stock, 12 Cal. 402; McGarrity v. Byington, 12 Cal. 432; Visher v. Webster, 13 Cal. 60; Adams v. Pugh, 7 Cal. 150; Ritchie v. Bradshaw, 5 Cal. 228; Knowles v. Joost, 13 Cal. 620; Lewis v. Covillaud, 21 Cal. 178; Oullahan v. Starbuck, 21 Cal. 413; Tebbs v. Weatherwax, 23 Cal. 58; Preston v. Keys, 23 Cal. 193; Ellis v. Jeans, 26 Cal. 275; Wilcoxson v. Burton, 27 Cal. 232, 87 Am. Dec. 66; Wilkinson v. Parrott, 32 Cal. 102; Newell v. Rusk, 23 Ind. 210; Oregon etc. R. R. Co. v. Oregon etc. Nav. Co., 3 Or. 178; Carron v. Wood, 10 Mont. 506, 26 Pac. 388; Falk v. Brown, 13 Mont. 125, 32 Pac. 492; Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Patton v. Patton, 5 J. J. Marsh, 389; United States v. Duval, Gilp. 356, Fed. Cas. No. 15015.

598 McKay v. Thorington, 15 Iowa, 25.

599 Harrington v. Butte etc. Min. Co., 27 Mont. 1, 69 Pac. 102; Dickey v. Davis, 39 Cal. 565; People v. Baker, 39 Cal. 686; Hawkins v. Abbott, 40 Cal. 641; Bates v. Howard, 105 Cal. 173, 38 Pac. 715; Warner v. F. Thomas etc. Cleaning Works, 105 Cal. 409, 38 Pac. 960; Phillpotts v. Blasdel, 8 Nev. 61.

600 Mason v. Austin, 46 Cal. 387; Sherman v. Mitchell, 46 Cal. 576; Treadway v. Wilder, 9 Nev. 67; Magaroli v. Mulligan, 11 Nev. 96; People v. Burt (Cal.), 3 Pac. 653; Davis v. United States R. R. Co., 3 Utah, 218, 2 Pac. 521; Johnson v. Hancock (Cal.), 4 Pac. 1093; Herzog v. Julien (Cal.), 4 Pac. 501; Nelson v. Floyd (Cal.), 4 Pac. 105.

one who tried the case and did not hear the testimony.[601] If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on appeal, for insufficiency of evidence to sustain the verdict.[602] But where there was evidence on both sides, it must clearly appear that the verdict was given by mistake or willful abuse of power;[603] but it should not go beyond that point to interfere with decision of fact fairly deducible from conflicting testimony.[604] In such case the verdict of a jury is decisive,[605] as in questions of fraud,[606] questions of title to chattels,[607] of the genuineness of a signature,[608] or a question turning on the credibility of a witness.[609]

§ 1623. Amendments, how made.—If the proposed statement be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto, and serve the same or a copy thereof upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and presented to the judge who heard or tried the cause, for settlement, or to the clerk of the court for the judge. Where the defeated party prepares a statement of the case for review and serves it upon the other party, who stipulates in writing that it may be signed without further notice, the judge cannot, in absence of such

601 Macy v. Davila, 48 Cal. 647; Altschul v. Doyle, 48 Cal. 535; Rice v. Cunningham, 29 Cal. 492.

602 Kile v. Tubbs, 32 Cal. 333; Rice v. Cunningham, 29 Cal. 492.

603 Carr v. Gale, 3 Woodb. & M. 38, Fed. Cas. No. 2435; Fearing v. De Wolf, 3 Woodb. & M. 185, Fed. Cas. No. 4711; Aiken v. Bemis, 3 Woodb. & M. 348, Fed. Cas. No. 109; Whetmore v. Murdock, 3 Woodb. & M. 380, Fed. Cas. No. 17509; Davison v. Sealskins, 2 Paine, 324, Fed. Cas. No. 3661; Stanley v. Whipple, 2 McLean, 35, Fed. Cas. No. 13286. To nearly the same effect: Blanchard's Gun Stock Turning Factory v. Jacobs, 2 Blatchf. 69, Fed. Cas. No. 1520; Baker v. The Potomac, 18 How. Pr. 185, Fed. Cas. No. 778; Shaw v. Collier, 18 How. Pr. 238, 4 Blatchf. 370, Fed. Cas. No. 12718; Walker v. Smith, 1 Wash. C. C. 202, Fed. Cas. No. 17087; People v. Forsythe, 65 Cal. 101, 3 Pac. 402; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952; Harrington v. Chambers, 3 Utah 94, 1 Pac. 362; Salisbury v. Brown (Cal.), 4 Pac. 544; Jack v. Saunders (Cal.), 4 Pac. 487; Reynolds v. Scott (Cal.), 4 Pac. 346.

604 Mathews v. Poultney, 33 Barb. 127; Smith v. Tiffany, 36 Barb. 23.

605 Conklin v. Thompson, 29 Barb. 218; Best v. Starks, 24 How. Pr. 58; Sheldon v. Hudson River R. R. Co., 29 Barb. 226; Williams v. Vanderbilt, 29 Barb. 491.

606 1 Gra. & W. New Trial, 353; Comfort v. Thompson, 10 Johns. 101; Jarvis v. Hatheway, 3 Johns. 180; People v. Townsend, 37 Barb. 520.

607 Gardner v. Ryerson, 19 How. Pr. 108.

608 Wright v. Carrillo, 22 Cal. 595.

609 United States v. Five Cases of Cloth, 2 N. Y. Leg. Obs. 84, Fed. Cas. No. 15110.

party, allow an additional material statement to be embodied therein.[610] If not adopted, the proposed statement and amendments shall within ten days thereafter be presented by the moving party to the judge, on five days' notice to the adverse party, or delivered to the clerk of the court for the judge, and settled as are bills of exceptions. If the action was tried by a referee, the statement shall be settled as are bills of exceptions. If no amendments are served within time, or, if served, are allowed, the statement or amendment, if any, may be presented for settlement without notice to the adverse party.[611]

§ 1623a. **Amendments after settlement.**—An amendment after settlement, adding no facts or exceptions, and not affecting the merits, and in furtherance of justice, is in the discretion of the court, and may be allowed.[612] Courts should be liberal in allowing amendments of this kind.[613] But, otherwise, a court should not entertain a motion to amend after it has been filed and served on the opposite party;[614] nor, unless good reason be shown, receive an affidavit made after time has elapsed.[615] A statement agreed to should not be amended, unless under a very clear showing of mistake or fraud.[616] A party intending to appeal from a judgment is limited to the use of the statement previously settled in the case for use on motion for a new trial.[617] Where the error arises out of the misunderstanding of the trial court clerk, no penalty will be imposed.[618]

§ 1624. **Certificate.** — When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.[619] Under the former Practice Act, the certificate of the attorneys for the respective parties, that the statement had been agreed upon and was correct, was also a mode of authentication.[620] And

610 Watkins v. La Mar, 10 Kan. App. 226, 1900, 69 Pac. 730.

611 Cal. Code Civ. Proc., § 659, subd. 3.

612 Valentine v. Stewart, 15 Cal. 387; affirmed in Loucks v. Edmondson, 18 Cal. 203. See Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458.

613 Caldwell v. Greeley, 5 Nev. 263.

614 Levy v. Getelson, 27 Cal. 685.

615 Howe v. Briggs, 17 Cal. 385.

616 Hutchinson v. Bours, 13 Cal. 52.

617 Vinson v. Los Angeles Pac. R. Co. (Cal.), 72 Pac. 840.

618 Matthews v. Nefsy, 13 Wyo. 238, 78 Pac. 664.

619 Cal. Code Civ. Proc., § 659, subd. 3; Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258; Scherrer v. Hale, 9 Mont. 63, 22 Pac. 151.

620 See Godchaux v. Mulford, 26 Cal. 316, 85 Am. Dec. 178; Richard-

it has been held, under the present California Code of Civil Procedure, that the certificate of the judge or referee may be waived by stipulation, and if so waived on the hearing of the motion, it cannot be raised on appeal.[621] A certificate cannot be added, nor additions made thereto, after appeal taken.[622]

The clerk's certificate must show that the papers attached are true transcripts of the record, or the supreme court has no jurisdiction.[623] The judge's certificate will not suffice in Colorado,[624] but will in Washington.[625] It is a proper practice for the trial judge to refuse to sign a statement on a motion for a new trial when it is a mere copy of the stenographer's notes.[626]

§ 1625. Effect of notice.—If the notice of the time and place of the settlement of a statement is given to appellant, and he does not attend, he cannot afterwards complain of the statement as settled.[627] A notice for settlement of a proposed statement applies to either mode of presentation prescribed by subdivision 3 of section 659 of the California Code of Civil Procedure.[628]

§ 1626. Exclusion of useless matter.—It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to the redundant or useless matter, or to any inaccurate statement.[629] If the motion is heard upon the minutes of the court, and a statement be subsequently prepared for appeal, such statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge

son v. City of Eureka, 96 Cal. 443, 31 Pac. 458; Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906.

621 Sarver v. Garcia, 49 Cal. 218. See, as to the effect of a recital in the order of the court, Millard v. Hathaway, 27 Cal. 138. In Vilhac v. Biven, 28 Cal. 413, it was held that a statement without any certificate of its correctness could not be considered on appeal.

622 Caples v. Central Pacific R. R. Co., 6 Nev. 265; Lamburth v. Dalton, 9 Nev. 64. As to presumptions in favor of judge's certificates, see Overman S. Min. Co. v. American M. Co., 7 Nev. 312.

623 Kincaid v. Friedman, 67 Kan. 838, 73 Pac. 52.

624 Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

625 Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

626 Sherman v. Higgins, 7 Mont. 486, 17 Pac. 563.

627 Vilhac v. Biven, 28 Cal. 409.

628 Douglas v. Southern Pacific Co., 151 Cal. 242, 90 Pac. 538.

629 Cal. Code Civ. Proc., § 659, subd. 3.

to exclude all other evidence or matter from the statement.[630] The proper place to object to the insertion of immaterial matter is on the settlement of the statement.[631]

§ 1627. **Engrossment of statement.**—The proper practice is to engross the statement as settled, and so much of the deeds and other documentary evidence as is directed to be inserted, with the authentication of the judge indorsed on the engrossed statement.[632] Where the refusal of the court to admit certain documentary evidence is relied upon as error, the record should contain either a copy of such documentary evidence or a settled abstract of its contents.[633] The engrossed statement must contain all that the parties rely on, set out in full as they wish it to be considered by the court.[634] Neither the notice of motion for new trial nor affidavits in support of it have properly any place in a statement on motion for a new trial.[635]

§ 1628. **Statement, how authenticated.**—A statement not authenticated by certificate of the parties or the judge will not be regarded.[636] A statement signed by the judge, and appearing from the minutes of the court to have been used on the hearing of the motion, is sufficiently authenticated.[637] Agreeing to submit a motion, without the statement having been settled or authenticated, does not waive objection to want of authentication. A refusal to strike out a proposed amendment is not an authentication and settlement of a statement;[638] nor is an indorsement by the judge at the bottom of the settlement that the amendments were allowed.[639] Where the record shows simply a statement signed by the judge, without any certificate preceding as to the correctness of the statement, it is insufficient.[640] Unless a statement be agreed to by counsel or settled by the judge, it has not sufficient authentication to constitute any portion of the record.[641] Where a statement is not authenticated in the mode prescribed by statute.

630 Cal. Code Civ. Proc., § 661.
631 Kimball v. Semple, 31 Cal. 657.
632 Id.; Marlow v. Marsh, 9 Cal. 259.
633 Doyle v. Franklin, 48 Cal. 537.
634 Bush v. Taylor, 45 Cal. 112.
635 Ferrer v. Home Mutual Ins. Co., 47 Cal. 416.
636 Vilhac v. Biven, 28 Cal. 409; Cosgrove v. Johnson, 30 Cal. 509.
637 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472.
638 Cosgrove v. Johnson, 30 Cal. 509.
639 Baldwin v. Ferre, 23 Cal. 461.
640 McCartney v. Fitz Henry, 16 Cal. 184.
641 Doyle v. Seawall, 12 Cal. 425; Paige v. O'Neal, 12 Cal. 492.

it is a good ground for denying a new trial.[642] In Colorado, the judge's certificate is not sufficient.[643]

§ 1629. Settlement, when made.—Such statements should be settled by the judge, and certified by him before the motion is decided,[644] unless the motion be made upon the minutes of the court.[645] But it need not be shown affirmatively that the settlement was upon proper notice, or in the presence of both parties.[646] Under the Montana practice, a statement on motion for a new trial may be settled and passed upon by the successor of the judge who tried the case.[647]

§ 1630. Necessity of motion for new trial.—Where error is apparent on the face of the record, no motion for a new trial is necessary to have the judgment reviewed.[648] Where a case is submitted on the pleadings, no evidence being offered, a motion for a new trial is not a condition precedent to the right to have the decision of the lower court reviewed, and the failure of the bill of exceptions to incorporate such a motion is not ground for quashing it on appeal.[649]

Errors occurring at the trial will not be reviewed unless presented to the trial court in a motion for new trial.[650] In the state of Washington, errors in rulings in the progress of the trial are sufficiently before the court on appeal without the motion for a new trial.[651] The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order

642 Esert v. Glock, 137 Cal. 533, 70 Pac. 479; O'Neil v. McLennan (Cal.), 73 Pac. 576; Powers v. Bond, 63 Kan. 887, 66 Pac. 629; Duston v. Foster, 64 Kan. 886, 67 Pac. 1102; Shadville v. Barker, 26 Mont. 45 66 Pac. 496, 761; Bruce v. Casey-Swasey Co., 13 Okla. 554, 75 Pac. 280; White v. White, 6 Nev. 20.

643 Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

644 Waggenheim v. Hook, 35 Cal. 216.

645 Cal. Code Civ. Proc., § 661.

646 Battersby v. Abbott, 9 Cal. 565. The method of making and settling statements commented on in Levey v. Fargo, 1 Nev. 416; Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124; Montana etc. Co. v. Howard, 10 Mont. 298, 25 Pac. 1024.

647 Territory v. Bryson, 9 Mont. 32, 22 Pac. 147. See Cummings v. Conlan, 66 Cal. 403, 5 Pac. 796, 903.

648 Kellogg v. School Dist., 13 Okla. 285, 74 Pac. 110.

649 Board of Commissioners v. Shaffner, 10 Wyo. 181, 68 Pac. 14; Dunn v. Claunch, 15 Okla. 27, 78 Pac. 388.

650 Glaser v. Glaser, 13 Okla. 389, 74 Pac. 944; Bradford v. Brennan, 15 Okla. 47, 78 Pac. 387.

651 Dubcich v. Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832.

itself, without a motion for a new trial.[652] Errors at the trial, not brought to the attention of the court by motion for new trial, are waived, and cannot be reviewed on appeal.[653]

§ 1631. Motion—Hearing.—Under the code system, from the entry of the verdict or filing of the findings of the court, the motion for a new trial is a kind of episode, or in a certain sense a collateral proceeding, a proceeding not in the direct line of the judgment; for the judgment may be at once entered, and even executed, while the motion for new trial ends in an order reviewable on an independent appeal.[654] The motion for a new trial must be made promptly, but especially if based upon the ground of surprise.[655] The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court; and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party.[656] If a motion for a new trial is not prosecuted with due diligence, it should be dismissed on application,[657] as a failure to prosecute is an abandonment of the motion.[658] Under the code provision that a motion for a new trial may be brought to a hearing on motion of either party, the delay of one of the parties in so doing is not ground for denying the motion.[659] The court may well refuse to extend the time for hearing of the motion, to enable the movant to secure more affidavits when he already has nine on file.[660] The question of delay is held to be in the discretion of the court below, which will not be interfered with unless abuse of discretion clearly appears.[661] And where it does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the ver-

652 In re Geary Est., 146 Cal. 105, 79 Pac. 855.

653 Insurance Co. v. Evans, 64 Kan. 770, 68 Pac. 623.

654 Spanagel v. Dellinger, 38 Cal. 284; Benedict v. Caffe, 3 Duer, 669.

655 Peck v. Hiler, 30 Barb. 655; Rapelye v. Prince, 4 Hill, 119.

656 Cal. Code Civ. Proc., § 660; Nev. Comp. Laws, § 3293.

657 Frank v. Doane and Green v. Doane, 15 Cal. 302; Eckstein v. Calderwood, 27 Cal. 413. See Warden v. Mendocino County, 32 Cal. 655; Ward v. Patterson, 46 Pa. St. 372.

658 Mahoney v. Wilson, 15 Cal. 42. But see Griffith v. Gruner, 47 Cal. 645.

659 Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114.

660 Smith v. Shook, 30 Mont. 30, 75 Pac. 513.

661 Boggs v. Clark, 37 Cal. 237; Chabot v. Tucker, 39 Cal. 435; Hopkins v. Western Pac. R. R. Co., 44 Cal. 389.

dict.[662] An order denying and dismissing a motion for a new trial, though inconsistent, will not be reversed on that ground.[663] Under the old California practice, if the judge who tried a case went to the county in his district not adjoining the one in which the case was tried to hold court before the time for filing amendments to the statement on motion for a new trial had expired, the moving party prosecuted the motion with due diligence if he brought the same to a hearing when the judge returned or first held court in a county adjoining the one in which the case was tried.[664] Under section 660 of the present code, it would seem that a notice of the hearing of the motion would be the proper practice after the statement, bill of exceptions, or affidavits had been filed.

§ 1632. **Time for hearing.**—The question of want of diligence in prosecuting a motion for new trial is one resting in the sound discretion of the court trying the motion, and in the absence of anything showing that the court did not exercise a sound discretion, the action of the trial court concerning the question of diligence will not be disturbed.[665] No proceedings for a new trial can be had until after the trial is completed and a final decision is reached by the court or jury. In an equity case, the verdict of a jury upon special issues is merely advisory to the court, and the time within which notice of intention to move for a new trial must be served does not begin to run until the court has adopted or rejected the findings of the jury.[666] A notice of intention to move for a new trial cannot be stricken out for want of diligence in prosecuting the motion.[667]

§ 1633. **Argument on motion.**—On the hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file.[668] As a rule, affi-

662 Myers v. Casey, 14 Cal. 542.

663 Descalso v. Duane (Cal.), 1893, 33 Pac. 328.

664 Warden v. Mendocino County, 32 Cal. 655; Simmons v. Goin, 45 Cal. 669.

665 Burlock v. Shupe, 5 Utah, 428, 17 Pac. 19.

666 Bell v. Marsh, 80 Cal. 411, 22 Pac. 170; Warring v. Freear, 64 Cal. 54, 28 Pac. 115.

667 Heilbron v. Heinlen, 70 Cal. 482, 12 Pac. 385.

668 Cal. Code Civ. Proc., § 660; Weatherbee v. Carroll, 33 Cal. 549; Bode v. Lee, 102 Cal. 583, 36 Pac. 936; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627.

davits only are used upon a motion for a new trial, but oral testimony is also admissible.[669] Any errors in law occurring at the trial must be presented in a bill of exceptions or statement of the case, and cannot be considered if presented merely in *ex parte* affidavits containing the evidence which was presented at the trial and the rulings thereon.[670] The motion can only be heard on the record made and settled before the motion is made,[671] except when made on the minutes of the court. The motion for a new trial is to be heard upon an independent record, distinct from the record upon which the judgment depends.[672] After notice of intention, defendants may, at their option, move or not move for a new trial, and, if they choose, may abandon their proceedings.[673] But if the statement sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion is not an abandonment of the same.[674]

§ 1634. **Denial of motion.**—An order dismissing a motion for a new trial is in effect denying a new trial.[675] Where the condition imposed in an order granting a new trial is not complied with, the motion for a new trial must be regarded as having been denied.[676] Where parties stipulate that a motion be denied, they cannot question the correctness of an order denying the same.[677] No "exception" lies to overruling a motion for a new trial, nor for entering judgment.[678]

§ 1635. **Effect of motion.**—A motion for a new trial filed within the time allowed by law preserves all rights till it can be heard and determined, and is not affected by the adjournment of the court for the term.[679] But a motion for a new trial does not stay proceedings on the judgment,[680] nor does it operate as a suspension of an injunction.[681] If, after a court has filed its findings of

669 Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103; Gano v. Wells, 36 Kan. 688, 14 Pac. 251.

670 Santa Cruz Rock Pav. Co. v. Bowie, 104 Cal. 286, 37 Pac. 934.

671 Cosgrove v. Johnson, 30 Cal. 509; Quivey v. Gambert, 32 Cal. 304.

672 Bode v. Lee, 102 Cal. 583, 36 Pac. 936.

673 Stoyell v. Cole, 19 Cal. 602.

674 Carder v. Baxter, 28 Cal. 99.

675 Warden v. Mendocino County, 32 Cal. 655.

676 Garoutte v. Haley, 104 Cal. 497, 38 Pac. 194.

677 Brotherton v. Hart, 11 Cal. 405.

678 Pomeroy v. Bank of Indiana, 1 Wall. 592, 17 L. Ed. 638. By Cal. Code Civ. Proc., § 647, it is deemed to have been excepted to.

679 Lurvey v. Wells Fargo & Co., 4 Cal. 106; see Copper Hill M. Co. v. Spencer, 25 Cal. 16.

680 People v. Loucks, 28 Cal. 68.

681 Ortman v. Dixon, 9 Cal. 23.

facts, the case is sent to a referee to take an account, the motion does not stay the proceedings pending before the referee.[682] Nor does the pendency of the motion for new trial stay proceedings so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.[683] The motion is not equivalent to a new action.[684] The hearing and disposition of a motion for a new trial is within the meaning of section 398 of the California Code of Civil Procedure, providing for change of place of trial on the ground of the disqualification of the judge before whom the case is pending.[685] An order granting a new trial is final, and the court cannot afterwards vacate it and decide again on the motion.[686] It vacates the judgment, if any, entered on the verdict or findings set aside, and for that reason an appeal from the judgment cannot be entertained.[687]

§ 1636. Hearing on motion.—The fact that instructions given by the court are lost or mislaid before a motion for a new trial is heard is no ground to suspend the hearing of the motion.[688] It is irregular for the court to reverse its first judgment, and render a contrary one, without hearing or notice.[689] The motion should not be decided before the statement has been settled, engrossed, and certified;[690] nor even then without notice to either party or any actual submission of the motion.[691] Upon the hearing of the motion the trial court is limited in its consideration to the matters contained in the statement, and is not at liberty to go outside of the statement for the purpose of determining whether the new

682 Crowther v. Rowlandson, 27 Cal. 376.

683 Copper Hill M. Co. v. Spencer (No. 1), 25 Cal. 11. As to effect of motion for a new trial in particular cases, see the following: United States v. Hodge, 6 How. 279, 12 L. Ed. 437; Clark v. Manufacturers' Ins. Co., 2 Woodb. & M. 472, Fed. Cas. No. 2829; Brent v. Coyle, 2 Cranch C. C. 348, Fed. Cas. No. 1838; Fraser v. Weller, 6 McLean, 11, Fed. Cas. No. 4064; Clark v. Sohier, 1 Woodb. & M. 368, Fed. Cas. No. 2835.

684 United States v. Hawkins' Heirs etc., 10 Pet. 125, 9 L. Ed. 369.

685 Finn v. Spagnoli, 67 Cal. 330, 7 Pac. 746.

686 Coombs v. Hibberd, 43 Cal. 452.

687 Kower v. Gluck, 33 Cal. 407; Wheeler v. Kassabaum, 76 Cal. 90, 18 Pac. 119. See Odd Fellows' Sav. Bank v. Deuprey, 66 Cal. 168, 4 Pac. 1173; Dorland v. Cunningham, 66 Cal. 484, 6 Pac. 135; Lang v. Superior Court, 71 Cal. 491, 12 Pac. 306.

688 Visher v. Webster, 13 Cal. 58.

689 Mitchell v. Hackett, 14 Cal. 661.

690 Morris v. De Celis, 41 Cal. 331. See, also, First Nat. Bank v. McAndrews, 5 Mont. 251, 5 Pac. 279; Fant v. Tandy, 7 Mont. 443, 17 Pac. 560; Brown v. Board of Commissioners, 15 Mont. 244, 38 Pac. 1072.

691 De Gaze v. Lynch, 42 Cal. 362.

trial should be granted or refused.[692] The court cannot go beyond the grounds on which a new trial was asked.[693] It is the duty of the trial court to examine the evidence, although it be conflicting, and, if dissatisfied with the conclusions reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case or by some other judge, where only knowledge of the facts is obtained from the records.[694] Where a new trial was prematurely granted through inadvertence, it was held that the order should have been vacated.[695] The proper place to raise the objection that the statement was not filed in time is in the trial court; it cannot be raised for the first time on appeal.[696]

§ 1637. Motion when made.—In California, and a few other states terms of court have been abolished; hence as to those states previous rules and decisions on the subject are of no particular value except as illustrative precedents.[697] A Colorado statute requiring the motion to be made during the term when the judgment was rendered has been held to be merely directory.[698] In Arizona under a statute providing that a motion for a new trial shall be made within two days after judgment,[699] while the court need not hear a motion filed after that time has elapsed, yet it may do so at any time during the same term.[700] Motions for a new trial and in arrest of judgment made on the same day will be presumed to have been made in proper order.[701]

A motion for a new trial should not be made while proceedings are pending before a referee.[702]

§ 1638. Pendency of motion.—In California, before the abolishment of terms of court, if a motion were taken under advisement, the court might in term time or vacation order judgment

692 Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114.

693 Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483.

694 Jones v. Sanders, 103 Cal. 678, 37 Pac. 649; Wilson v. California Cent. R. R. Co., 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806.

695 Hall v. Polack, 42 Cal. 218.

696 Twist v. Kelly, 11 Nev. 377.

697 Spelling, on New Trial and Appellate Practice, § 26.

698 Mills' Ann. Code, § 218; Gomer v. Chaffee, 5 Colo. 383.

699 Revised Statutes, par. 836.

700 Svea Ins. Co. v. McFarland (Ariz.), 60 Pac. 936.

701 Water etc. Co. v. Gildersleeve, 4 N. Mex. 170, 16 Pac. 278.

702 Crowther v. Rowlandson, 27 Pac. 376.

rendered on a verdict and recorded.[703] And if, pending a motion for a new trial taken under advisement, a new term intervened it was a continuance of the motion and the court could act on it at its convenience.[704] But in Arizona a statute requiring a motion to be determined during the same term in which it was made was held to be mandatory, and if it was not so determined it was discharged at the end of the term by operation of law.[705]

In New Mexico, under a rule of court requiring motions to be argued and determined at the term at which the case is tried, unless the court expressly continues the motion, and providing that no continuance shall be for more than thirty days, it was held that the failure of the court to pass upon the motion for thirty days did not divest it of jurisdiction over the motion, but the court would be deemed to have deferred action thereon for good cause within its power to further continue it.[706]

§ 1639. Parties to motion.—One of several parties against whom a judgment is rendered, who does not join in the motion for a new trial, cannot complain of alleged error in denying a new trial.[707] If some of the parties against whom the order denying a new trial is rendered do not appeal therefrom, those that appeal must serve on them a notice of appeal, otherwise the supreme court will refuse to entertain the appeal.[708]

§ 1640. New trial—Modification of judgment.—If upon the hearing of the defendant's motion for a new trial, the court decides that the judgment for the plaintiff is too great, it is not proper procedure to order it modified upon consent of the plaintiff, but the court should cause the plaintiff to enter a *remittitur* of the excess when denying the new trial.[709] It is within the discretion of the trial court to grant a new trial on grounds of excessive damages, unless the successful party consents to a certain modification of the amount of damages.[710] Where the verdict is too small, and

703 Hutchinson v. Bours, 13 Cal. 50.

704 Id.; Sheppard v. Wilson, 6 Howard, 260, 12 L. Ed. 430.

705 Ruff v. Hand (Ariz.), 24 Pac. 247.

706 Pearce v. Strickler, 9 N. Mex. 46, 49 Pac. 727.

707 Calderwood v. Brooks, 28 Cal. 151.

708 People v. Center, 61 Cal. 191. As to new trial as to one defendant, see Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Wittenbrock v. Bellmer, 57 Cal. 12.

709 Chalmers v. Chalmers, 81 Cal. 81, 22 Pac. 395.

710 Ingraham v. Weidler, 139 Cal. 588, 73 Pac. 415; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377.

the deficiency can be ascertained by adding the interest agreed on, it is not error to refuse plaintiff a new trial and render judgment for the proper amount.[714] In an action for damages, the court may order a *remittitur* of a part of the damages as a condition to overruling the motion for a new trial; but where it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict.[715] Under a statute permitting parties to have all issues, at law or equity, submitted to a jury, where the jury bring in a verdict for an excessive amount of damages, and the damages are not capable of exact ascertainment, as for injured feelings, the court cannot cure the evil by permitting a *remittitur,* but must grant a new trial.[716]

§ 1641. The same—Res adjudicata.—The doctrine of *res adjudicata* applies to the decision of a motion for a new trial, and after the motion has been denied the moving party is not at liberty to make a second motion therefor.[717] An order denying motion to dismiss motion for new trial, on ground of delay in presenting it, is not *res judicata* on renewed motion made long after order denying former motion where it does not appear that the same facts existed. The burden is on plaintiff to show that the same facts do exist.[718]

§ 1642. The same—In supreme court.—A motion for a new trial of a proceeding originally commenced in the supreme court will be entertained under section 988 of the Utah Code of Civil Procedure.[719]

§ 1643. The same—Motion for in federal courts.—A motion for a new trial in the federal courts is a motion addressed to the discretion of the court, and the decision of the court, in granting or refusing it, alone is not the proper subject of a bill of exceptions.[720]

714 Marsh v. Kendall, 65 Kan. 48, 68 Pac. 1070.

715 Adcock v. Oregon R. & Nav. Co., 45 Or. 173, 77 Pac. 78.

716 Southern Pacific Co. v. Fitchett, 9 Ariz. 128, 1905, 80 Pac. 359.

717 Egan v. Eagan, 90 Cal. 15, 27 Pac. 22.

718 Lee Doon v. Tesh, 131 Cal. 406, 63 Pac. 764.

719 People v. Spiers, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509.

720 Barr v. Gratz, 4 Wheat. 213, 4 L. Ed. 553; Coleman v. Bell, 4 N. Mex. 46 (21) 12 Pac. 657.

§ 1644. The same—As to part of issues.—Where the issues are separable, the losing party may move for a new trial as to a part, leaving the findings to stand as to the remainder.[721] But in granting a new trial *pro tanto* as to certain particular issues only, the trial court should with great certainty recite the issues in terms upon which the new trial is to be had. And the practice of granting a new trial as to the issues covered by certain numbered findings is condemned as bad.[722]

§ 1645. The same—Bill of exceptions—Ambiguity.—When the specifications in a bill of exceptions used on a motion for new trial include a double statement that the evidence is insufficient to justify the decision, and that the decision is against law in the particulars specified, the ambiguity is removed where the particulars stated show that the objection is to the insufficiency of the evidence.[723] Under the Montana Laws of 1907 (p. 89), there is no statement on motion for new trial; but the motion must be made upon the affidavits or the minutes of the court or upon a bill of exceptions, which need not contain any specifications of errors.[724]

§ 1646. The same—Striking statement from files.—A statement on motion for a new trial will not be stricken from the record upon the alleged ground that it was not presented to the judge who tried the case, or delivered to the clerk for the judge to settle and sign within ten days after service of the proposed amendments, where it appeared that after the statement and amendments thereto were filed, both were presented to the judge and settled in the presence of respective counsel.[725] Nor will such a statement be disregarded because amendments thereto are not engrossed in the record, but occupy a separate position at the close of the statement, where such amendments comprise additional matter which is complete and intelligible in itself.[726] Under the Colorado prac-

721 San Diego Land etc. Co. v. Neale, 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 1, 35 Pac. 437.

722 Mountain Tunnel etc. Min. Co. v. Bryan, 111 Cal. 36, 43 Pac. 410.

723 Combination Land Co. v. Morgan, 95 Cal. 548, 30 Pac. 1102.

724 Milwaukee Gold etc. Co. v. Gordon, 37 Mont. 209, 95 Pac. 995; Mont. Rev. Codes, §§ 6784, 6796.

725 Sell v. Graves, 14 Mont. 341, 36 Pac. 354.

726 Penn Placer Min. Co. v. Schreiner, 14 Mont. 121, 35 Pac. 878. See Doyle v. Gore, 13 Mont. 471, 34 Pac. 846.

tice, a motion for a new trial at a subsequent term without an order extending time, will not be considered, and may be stricken from the files.[727] Where a statement on motion for a new trial is stricken from the files, the motion for a new trial is properly denied.[728] The judge must disregard on appeal the statement and all questions sought to be raised thereby, if within ten days after service of the amendments by the opposite party, and failure to accept the same, they are not presented to the judge for settlement.[729] When the notice of motion for a new trial sets out as a ground the insufficiency of the evidence, the statement must specify the particulars in which it is not sufficient; otherwise, the statement will be disregarded. And the court will not consider what the evidence does show, but what it does not show; and a specification that the evidence is insufficient because it shows contributory negligence will be ignored on appeal.[730]

§ 1647. Review of new trial order—In general.—When an order granting a new trial has been made upon some legal proposition which may be considered in itself, a stronger showing is required to justify the appellate court in interfering with it than with an order refusing a new trial.[731] If the order granting a new trial is silent as to the ground on which it was made, and the existence of a valid ground is shown by the record, the appellate court will presume that the order was made on that ground.[732] If the record fails to show upon what ground the motion for a new trial was granted, and the evidence is conflicting, it will be presumed that the motion was granted upon the ground of the insufficiency of the evidence to support the verdict.[733] While a trial court may make its order awaiting a new trial, in case of mistake, inadvertence, etc., it has no authority to vacate such an order be-

727 Clark v. Perry, 17 Colo. 56, 28 Pac. 329; Lee Silver Min. Co. v. Englebach, 18 Colo. 106, 31 Pac. 771.

728 Sutton v. Symons, 100 Cal. 576, 35 Pac. 158.

729 Wright v. Mathews, 28 Mont. 442, 72 Pac. 820.

730 Mont. Rev. Codes, § 6796; Cain v. Gold Mountain Min. Co., 27 Mont. 529, 71 Pac. 1004.

731 Mehan v. C., R. I. etc. R. R. Co., 55 Iowa, 308, 7 N. W. 613; Cooney v. Furlong, 66 Cal. 520, 6 Pac. 388.

732 Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806. See People v. Lum Yit, 83 Cal. 130, 23 Pac. 228; Bank v. Hitchcock, 76 Cal. 489, 18 Pac. 648.

733 Tide-Land Reclamation Co. v. Cunningham, 71 Cal. 221, 16 Pac. 711; Irving v. Cunningham, 58 Cal. 306. See Minturn v. Bliss, 77 Cal. 90, 19 Pac. 185; White v. Merrill, 82 Cal. 14, 22 Pac. 1129.

cause it is deemed erroneous.[734] When all the evidence offered on the hearing of the motion is not before the appellate court, the finding of the court below will be accepted as correct.[735] If the statement is certified by the trial judge to be correct, an objection upon appeal that the statement does not contain all the evidence is without merit.[736] Upon an appeal from an order denying a new trial, questions relating to the sufficiency of the complaint cannot be reviewed or considered by the appellate court.[737] Nor does such an appeal involve a review of the judgment, the correctness of which can be determined only by an appeal therefrom.[738] Nor has the appellate court jurisdiction to revise the proceedings of the trial court in settling statements of cases.[739] But it is held that the appellate court has power to review anything that the lower court passed upon in deciding the motion for a new trial,[740] but will consider no matters not made the basis of such motion.[741] Affidavits used on such motion will not be considered by the reviewing court, unless brought into the record by a statement or bill of exceptions,[742] nor unless identified as having been used on the motion.[743] Where the bill of exceptions does not contain all of the evidence, the appellate court will not review the action of the lower court in overruling a motion for a new trial because the verdict is not sustained by the evidence.[744]

§ 1648. The same—Affirmation of order granting or denying.—An order granting a new trial will be affirmed, if it can be justified on any of the grounds upon which the motion for a new trial was based, without regard to the reasons for the order expressed in the opinion of the judge.[745] Such order will be affirmed if, upon the whole record, it appears that a new trial

734 Coyle v. Seattle Electric Co., 31 Wash. 181, 71 Pac. 733.

735 Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103.

736 Richardson v. City of Eureka, 96 Cal. 443, 31 Pac. 458.

737 Evans v. Paige, 102 Cal. 132, 36 Pac. 406.

738 Bode v. Lee, 102 Cal. 583, 36 Pac. 936.

739 Cox v. Delmas, 92 Cal. 652, 28 Pac. 687; Hyde v. Boyle, 86 Cal. 352, 24 Pac. 1059.

740 Needham v. Salt Lake City, 7 Utah, 319, 26 Pac. 920. See McLaughlin v. Doherty, 54 Cal. 519.

741 Wyoming Loan etc. Co. v. W. H. Holliday Co., 3 Wyo. 386, 24 Pac. 193; Rhodes v. Mummery, 48 Ind. 216.

742 People v. Callaghan, 4 Utah, 49, 6 Pac. 49.

743 Bagnall v. Roach, 76 Cal. 106, 18 Pac. 137.

744 Wood v. Farnham, 1 Okla. 375, 33 Pac. 867; Louisville etc. R. R. Co. v. Henley, 88 Ind. 535.

745 Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; People v. Flood, 102 Cal. 330, 36 Pac. 663; Mills v.

should be had,[746] or if there is any theory upon which the action of the lower court in granting the order can be sustained.[747] An order denying a new trial will be affirmed, if any sufficient ground appears for the denial of the motion.[748] And when the findings of fact in favor of the plaintiff upon all the issues support the judgment, and no particular in which any one of them is not justified by the evidence is specified in the bill of exceptions upon which the motion for a new trial was made, the order denying a new trial will be affirmed.[749]

§ 1649. **The same—Reversal of order granting.**—An order granting a new trial will be reversed as readily as an order refusing it, when it is granted solely through a misapprehension of law.[750] The trial court cannot vacate its order granting a new trial on the grounds that the order was erroneous, unless the error occurred through mistake, inadvertence, or fraud.[751] When undenied averments of the complaint and findings not excepted to render the ground upon which a new trial was granted immaterial, and it can be justified upon no other ground, the order granting the new trial will be reversed.[752] But an order granting a new trial on the ground of errors which occurred during the trial will not be reversed on appeal, if it appears that any errors prejudicial to the respondent were committed on the trial.[753] An order of the court dismissing the proceedings on a motion for a new trial cannot be set aside on an *ex parte* application.[754]

Oregon etc. Nav. Co., 102 Cal. 357, 36 Pac. 772.

746 Noyes v. Wood, 102 Cal. 389, 36 Pac. 766.

747 Trumbull v. Jackman, 9 Wash. 524, 37 Pac. 680. See Wormouth v. Gardner, 105 Cal. 149, 38 Pac. 646; Gross v. Kelleher, 80 Cal. 519, 22 Pac. 293; Townsend v. Briggs, 88 Cal. 230, 26 Pac. 108; Haggin v. Saile, 14 Mont. 79, 35 Pac. 514.

748 Gray v. Winder, 77 Cal. 525, 20 Pac. 47.

749 Baird v. Peall, 92 Cal. 235, 28 Pac. 285.

750 Schramm v. Southern Pacific Co., 87 Cal. 425, 25 Pac. 481.

751 Coyle v. Seattle Electric Co., 31 Wash. 181, 71 Pac. 733.

752 Hayes v. Fine, 91 Cal. 391, 27 Pac. 772.

753 In re Crozier, 74 Cal. 180, 15 Pac. 618; McCarthy v. Loupe, 62 Cal. 300.

754 Greehn v. Marker, 67 Cal. 364, 7 Pac. 783.

FORMS ON MOTION FOR NEW TRIAL.

§ 1650. Notice of intention to move for new trial.

Form No. 474.

[TITLE.]

To . . . , Attorney for Plaintiff:

Take notice, that defendant, C. D., intends to move the court to vacate and set aside the verdict [or, decision of the court] rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, to-wit:

I. Irregularity in the proceedings of the court [jury; or, adverse party; or, any order of the court; or, abuse of discretion], by which the defendant was prevented from having a fair trial.

II. Misconduct of the jury [or, a resort by the jury to the determination of chance on the questions submitted to them].

[Or, II. That the jury, after having retired, were permitted to come into court and receive instructions during the absence of the defendant herein, and of his counsel].

III. Accident or surprise, which ordinary prudence could not have guarded against.

IV. Newly discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

V. Excessive damages appearing to have been given under the influence of passion or prejudice.

VI. Insufficiency of the evidence to justify the verdict [or, other decision; or, that the verdict is against law].

VII. Errors in law occurring at the trial, and excepted to by the defendant, to-wit.

Said motion will be made upon affidavits hereafter to be filed and served upon you [or, upon bill of exceptions; or, a statement of the case hereafter to be prepared; or, upon the minutes of the court in said cause].

[SIGNATURE.]

§ 1651. Motion for new trial on ground of newly discovered evidence.

Form No. 475.

[TITLE.]

Gentlemen: Take notice, that upon the affidavits of L. M. and N. O., copies of which are herewith served upon you, and upon the

pleadings and proceedings on file in said action [and upon the bill of exceptions heretofore settled in said action], the undersigned will, on the . . . day of . . ., 19.., at . . . o'clock A. M. of that day, at the courthouse in . . . move the court for an order setting aside the verdict in this action [and the judgment entered therein], and for a new trial herein, upon the newly discovered evidence set forth in said affidavits

[DATE.]

[ADDRESS.] R. S., Attorney for . . .

§ 1652. Affidavit to move for a new trial on the ground of surprise.

Form No. 476.

[TITLE.]

[VENUE.]

Q. R., being duly sworn, says that he is the attorney for the defendant herein.

That this action was brought to recover possession of certain real property, to-wit: a farm in the county of . . . , in this state.

That from the commencement of this action until about [ten] days prior to the trial hereof, the attorney for the plaintiff had in his possession a certain deed, made and executed by the father of the plaintiff, now deceased, conveying said real property in fee to one J. K.

That plaintiff claims title to said real property by descent from his said father, and in no other way.

That deponent gave plaintiff's attorney reasonable notice to produce said deed on the trial, and further duly and seasonably subpœnaed the plaintiff's attorney to attend the trial, and bring with him the said deed.

That prior to the service of said notice and subpœna, the plaintiff's attorney delivered said deed to the plaintiff, who thereupon deposited the same with L. M., the counsel of plaintiff, residing in . . .

That at the trial of this action, deponent learned for the first time that the said plaintiff's attorney had parted with said deed.

That up to the time he was put upon the stand, the plaintiff's attorney entirely concealed from deponent the fact that said deed was out of his possession.

That deponent was taken entirely by surprise by the failure of the plaintiff's attorney to produce said deed.

That on a new trial deponent can, as he believes, obtain the production of said deed, or, if not, can prove the contents thereof by the testimony of J. K.

[JURAT.] Q. R.

§ 1653. Motion for new trial, on the minutes of the judge.

Form No. 477.

[TITLE.]

And now comes the defendant above named at the same term at which the said action was tried, and moves, upon the minutes of the judge, to set aside the verdict herein, and for a new trial of said action, upon the following grounds:

I. Because the court erred in overruling the defendant's objection to the reception of any evidence under the complaint.

II. Because the court erred in admitting evidence against the objection of the defendant.

III. Because the court erred in refusing to receive evidence offered by the defendant upon the trial.

IV. Because the court erred in instructing the jury in the particulars to which the defendant has filed written exceptions.

V. Because the court erred in refusing to instruct the jury as requested by the defendant in writing.

VI. Because the verdict is contrary to law.

VII. Because the verdict is contrary to the evidence.

VIII. Because the damages are excessive.

[DATE.] J. K., Defendant's Attorney.

§ 1654. Motion to set aside report and for a new trial.

Form No. 478.

[TITLE.]

Please take notice, that upon the report of O. P., Esq., the referee herein, heretofore filed, and upon the pleadings and papers on file in this action, [and the affidavits of E. F. and G. H., of which copies are herewith served on you], the plaintiff [or, defendant] will move the court, on the . . . day of . . ., 19. ., at the courthouse in the city of . . ., in said county, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the said report of the referee and directing a new trial of the issues in this action.

[DATE.] M. N., Attorney.

[ADDRESS.]

§ 1655. Affidavit on ground of irregularity.

Form No. 479.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The jury was irregularly impaneled in the said cause, having been selected by the sheriff from the bystanders, and not from the body of the county; that no venire was issued in said cause, nor return thereon made by the sheriff of said county.

§ 1656. Affidavit on ground of the misconduct of the jury.

Form No. 480.

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says as follows:

The jury impaneled in the above-entitled cause, in finding their verdict in the same, resorted to the determination of chance, to-wit [each juror threw dice, upon an agreement that the one who threw the highest number should name the verdict, whereupon Q. R. threw the highest number and fixed the verdict].

[JURAT.] [SIGNATURE.]

§ 1657. Affidavit on motion—Ground of surprise.

Form No. 481.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled cause.

II. Previous to the trial of said cause, to-wit, on the . . . day of . . ., 19.., at . . ., one M. N. informed me that he knew and would testify to [state a material point in defense], and relying on said assurance I took no steps to procure other testimony to said fact, and summoned the said M. N. to testify to the same, but the said M. N. when called to the stand at the trial of said cause, by collusion with the plaintiff therein [or, state any fact or occurrence for which defendant is not responsible], testified contrary to what he had previously stated he would do, and the verdict, which was against the defendant, was mainly attributable to said testimony, and on a new trial [state material point] will be established by evidence, and a different verdict will result.

III. I am able to prove the same fact by O. P., who resides at . . ., and whose testimony I can procure at the new trial of this cause.

[JURAT.] [SIGNATURE.]

§ 1658. Affidavit on motion—Ground of newly discovered evidence.

Form No. 482.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. Subsequent to the trial of said cause, to-wit, on the . . . day of . . ., 19. . , I have discovered evidence which will establish the fact [state a fact material to the issue]; that said evidence is new, material to the issue, and not cumulative, nor will it be brought to impeach any evidence or the testimony of any witness who has been heretofore examined in the said action.

III. I did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence [or, the utmost diligence] have discovered and produced the same upon the former trial.

[JURAT.] [SIGNATURE.]

§ 1659. Corroborating affidavit.

Form No. 483.

[TITLE.]

[VENUE.]

J. K., being duly sworn, says:

That he is, and was at the time of the conversation between L. M. and the defendant's agent, O. P., a clerk in the store of the defendant.

That at the said conversation so referred to the said O. P. made the representations set forth in the foregoing affidavit, and no others.

That deponent did not communicate the facts aforesaid to the defendant before the verdict in this action because [here set forth reasons; as, for instance, deponent did not know that any action had been commenced or was pending between the parties until after said verdict was rendered].

[JURAT.] J. K.

§ 1660. Affidavit for new trial on ground of improper communication by a party to the members of the jury.

Form No. 484.

[TITLE.]

[VENUE.]

J. K., being duly sworn, says:

That on the morning of the second day of the trial of this cause, and after the plaintiff had rested his case, but before the opening of the court, three of the jurors who were impaneled to try the cause were in the barroom of a public house in the village of . . ., together with a number of other persons there assembled.

That while said jurors were there the plaintiff addressed them, and said in their presence and hearing that the defendants were a cut-throat corporation; that they had swindled the public; that they had defrauded him, the plaintiff; that he (plaintiff) had paid them thousands of dollars; that he delivered the fruit in controversy on said trial to the defendants at their dock, to be carried on their boats, and that they refused to carry the same, and went off without it; and in consequence the fruit rotted or spoiled on his (plaintiff's) hands, and he lost several hundred dollars; and that defendants ought to stand it, or be compelled to suffer the loss.

That thereupon the constable in attendance upon the court remarked to the plaintiff, in the presence and hearing of the jurymen, that the persons he was addressing were jurymen, and asked plaintiff if he did not know it.

That plaintiff immediately replied that he knew what he was about, and requested the constable to mind his own business, and that what he had been saying to the jurors about his suit was true; and he (plaintiff) afterwards continued addressing the jurors in substance as before, detailing as he (plaintiff) insisted, what were the facts of his case, and the mismanagement of the defendants in relation to his fruit.

[JURAT.] J. K.

§ 1661. Order for new trial for excessive damages.

Form No. 485.

[Recital of facts.]

Ordered, that said verdict be and is hereby set aside, and the said motion for a new trial be and is granted [the costs to abide the event], on the ground of excessive damages, unless the plaintiff, within . . . days, file a stipulation consenting to remit from said

verdict the sum of . . . dollars, and take judgment for the sum of . . . dollars, with costs.

In case of such remission, the motion is denied.

[DATE.] O .P., Circuit Judge.

§ 1662. Order granting new trial before judgment on terms.

Form No. 486.

[TITLE.]

The defendant's motion to set aside the verdict herein, and for a new trial upon the minutes, having been heard on this . . . day of . . . , 19 . . , and the court being fully advised in the premises:

Ordered, that upon payment by the defendant of the taxable costs of the former trial, taxed at . . . dollars, within . . . days from this date, the verdict herein be set aside, and a new trial be granted upon the grounds [here state grounds].

Further ordered, that upon default in such payment said motion be denied, and judgment be entered upon the verdict, on due proof of such default.

[DATE.] O. P., Judge.

§ 1663. The same—Without terms.

Form No. 487.

[Introduction as in preceding form.]

Ordered, that the said verdict be and the same is hereby set aside, and a new trial granted, costs to abide the event of the action, on the ground [here state grounds; as, for instance, that the verdict was perverse; or, that the verdict was entirely unsupported by the evidence; or, that the court erroneously instructed the jury in this: state erroneous instruction.]

[DATE.] O. P., Judge.

§ 1664. The same—After judgment entered.

Form No. 488.

[Recitals as in preceding orders.]

Ordered, that the verdict herein, and the judgment entered thereon, on the . . . day of . . . , 19. . , be and they are hereby set aside and vacated, on the ground that [state ground], the costs of the former trial to abide the event of the action [or, upon payment, state terms as in preceding form].

[DATE.] O. P., Judge.

§ 1665. Statement on motion for new trial.

Form No. 489.

[TITLE.]

This is an action of ejectment for a parcel of land described in the complaint herein [being a portion of a tract of land . . . chains square, called the . . . claim, lying on the north side of the road leading from . . . to . . .].

The cause, being regularly called, was tried before the court without a jury, on the . . . day of . . ., 19.. The defendant moved for a judgment on the pleadings, which motion was denied, and thereupon the following evidence was introduced:

M. N., called and sworn for plaintiff, testified as follows, etc. [Insert testimony in a narrative form, or its substance.]

Cross-examined, etc.

O. P., called and sworn for plaintiff, testified as follows, etc. [Insert testimony.]

Cross-examined, etc.

Book of surveys shown witness, and identified. Plat in said book introduced. Deed [state parties and contents] shown witness; knows the signature. Deed offered in evidence, defendant objected [state grounds of objection]; objection overruled, and deed introduced, marked "Exhibit No. 1"; defendant excepted.

Cross-examined, etc.

Recalled, examined, says, etc.

Cross-examined, says, etc.

It was here admitted that [state admission]; the plaintiff offered and read in evidence a deed marked "Exhibit No. 2," dated . . ., from . . . to . . ., for . . . [the land in contest]; defendant objected to the introduction of the deed [state grounds]; objection overruled, and defendant excepted. Also deed marked "Exhibit No. 3," dated . . ., from . . . to . . ., for acres, including the premises in suit. Also deed marked "Exhibit No. 4," dated . . ., from . . . to . . ., for . . . acres, including the premises in suit. Which deeds were all admitted and read in evidence against the same objections of the defendant as above named, which were overruled, and to which he excepted.

Plaintiff also offered and read in evidence deposition of . . ., on file in this cause, as follows: [Insert in narrative form. State in like manner the evidence introduced on behalf of defendant.]

SPECIFICATION OF PARTICULARS IN WHICH THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDINGS AND DECISIONS OF THE COURT.

I. The first finding of the court is unsustained by the evidence for the reason that [show wherein].

II. That portion of the second finding reading as follows: [designate the objectionable portion] is contrary to the evidence in this: [show wherein].

III. That portion of the second finding reading as follows: [designate other portion] is not sustained by the evidence [show wherein].

ERRORS OF LAW.

I. The court erred in denying defendant's motion for judgment on the pleadings.

II. The court erred in admitting in evidence said deed of . . . to . . ., dated . . ., marked "Exhibit No. 1," there being no seal affixed thereto, and the acknowledgment thereof being defective.

III. The court erred in admitting in evidence said deed of . . . to . . ., dated . . ., of the land shown to be the homestead property of . . . and his wife, without the signature and acknowledgment of the wife.

IV. The court erred in refusing to allow defendant to prove that he actually held, possessed, and occupied the demanded premises continuously and adversely, from the . . . day of . . ., 19. . , to the . . . day of . . ., 19. . , claiming the same in his own right, adversely to all the world, including . . .

[SIGNATURE.]

§ 1666. Notice of settlement of statement.

Form No. 490.

[TITLE.]

A. B., Esq., attorney for plaintiff, John Doe:

Please take notice, that the defendant's statement to be used on his motion for a new trial herein will be settled by the judge of this court on the . . . day of . . ., 19. . , at . . . o'clock, at his chambers, in the city hall in the city of . . ., in the county of . . .

[ADDRESS.] [SIGNATURE.]

CHAPTER LX.

WRIT OF ERROR TO THE SUPREME COURT OF THE UNITED STATES.

§ 1667. In general.—The subject of appeal to the supreme court of the United States, or, more properly speaking, of writ of error to that court, is of such magnitude that any pretense at a full discussion of it would be out of place in a work of this scope. We shall, therefore, endeavor to state briefly such general rules and principles as should be familiar to the practitioner desiring to resort to our highest tribunal for relief.

The only mode in which the supreme court may review a final judgment or decree of a state court is upon writ of error, and such review is confined to cases enumerated in section 709 of the Revised Statutes of the United States. This section provides that "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission, or authority, may be reexamined and reversed or affirmed in the supreme court upon a writ of error."

The judgment of a state court cannot be reviewed unless the federal question involved is personal to the plaintiff in error.[1] Thus a stranger to a contract cannot raise the question of its impairment for the purpose of claiming a federal question.[2]

1 Texas etc. R. R. Co. v. Johnson, 151 U. S. 81, 38 L. Ed. 81, 14 Sup. Ct. 250.

2 Phinney v. Sheppard etc. Hospital, 177 U. S. 170, 44 L. Ed. 720, 20 Sup. Ct. 573.

Likewise, in a suit against a corporation and trustees of a mortgage given by the corporation, the corporation may alone appeal for the reason that it is the only real party.[3]

The judgment of a state court being reviewable only by writ of error, the review is necessarily limited to questions of law. It is also well settled that the supreme court will only review such federal question as has been properly raised and decided in the state court. The latter's decision on all other matters. both of law and fact, will be accepted by the supreme court as conclusive upon it.[4]

§ 1668. Procedure on error.—Writs of error from the supreme court to a state court, in cases authorized by law, shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.[5] The term "court of the United States," referred to in this section is a circuit court or district court.[6] There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.[7] The writ may be issued by the clerk of the circuit court in the state to whose court it is directed;[8] or it may be issued by the clerk of the supreme court.[9] The writ must be, as nearly as each case will admit, agreeable to the form of writ of error transmitted by the clerk of the supreme court to the clerks of the several circuit courts.[10]

The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.[11] The record required to be attached to the writ of error is the record of the state's supreme court in the cause, being the statement upon which the appeal was taken, with the other matters

3 Norwich etc. R. R. Co. v. Johnson, 15 Wall. 8, 21 L. Ed. 118.

4 Rose's Code Fed. Proc., § 2084.

5 U. S. Rev. Stats., § 1003, U. S. Comp. Stats. 1901, p. 713.

6 Allen v. Southern Pacific Co., 173 U. S. 479, 43 L. Ed. 779, 19 Sup. Ct. 518.

7 U. S. Rev. Stats., § 997, U. S. Comp. Stats., 1901, p. 712.

8 Buel v. Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

9 Ex parte Ralston, 119 U. S. 614, 30 L. Ed. 506, 7 Sup. Ct. 317.

10 U. S. Rev. Stats., § 1004.

11 U. S. Sup. Ct. Rule 8, revised Jan. 4, 1884.

composing the transcript, together with the judgment of the supreme court, and also a copy of the opinion or opinions rendered in the case.[12] There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party.[13]

The original writ of error should be returned to the appellate court attached to the transcript.[14] But the mere failure to attach the writ is not a fatal defect, and it may be attached in the appellate court.[15] The destruction of the original writ will excuse its return, if a copy thereof be annexed to the record, with affidavits showing the destruction.[16] In like manner where, by mistake, a copy of the writ was annexed to the transcript instead of the original, upon the presentation of the original with the citation, and acknowledgment of the service thereon, both certified by the clerk, they may be made or recognized as part of the record. No formal application for the writ is necessary, since it issues as a matter of course. The party desiring the review is denominated the plaintiff in error, and the opposite party the defendant in error. When the writ is issued by the supreme court of the United States to a state court, the citation to the defendant in error shall be signed by the chief justice or judge or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice.[17]

The judge or justice signing the citation shall, except in cases brought up by the United States, or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ on appeal to effect; and if he fail to make his plea good, shall answer all damages or costs where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas*.[18] The clerk of the supreme court of the United States

12 U. S. Sup. Ct. Rule 8.

13 U. S. Rev. Stats., § 997, U. S. Comp. Stats. 1901, p. 712.

14 Mussina v. Cavazos, 6 Wall. 357, 18 L. Ed. 810.

15 Cotter v. Alabama etc. R. R. Co., 61 Fed. 747, 10 C. C. A. 35.

16 Mussina v. Cavazos, 6 Wall. 357, 18 L. Ed. 810.

17 U. S. Rev. Stats., § 999; U. S. Comp. Stats., 1901, p. 712.

18 U. S. Rev. Stats., § 1000; U. S. Comp. Stats., 1901, p. 712; U. S. Sup. Ct. Rule 29; Haskins v. Rail-

secures the printing of the record, and charges the parties for a manuscript copy for the printer; and to secure this expense and his fees in the case, there is required of the plaintiff in error a bond in the penalty of two hundred dollars, or a deposit of that amount, to be placed in bank subject to his draft.[19]

All process from the supreme court must bear the teste of the chief justice of the United States; hence a writ of error to a state court which fails to bear such teste will be dismissed.[20] Thus a writ of error issued by a clerk of the state court bearing the teste of the chief justice of the state is wholly insufficient to give the supreme court of the United States jurisdiction.[21] Where, however, the writ is properly allowed and tested, it is questionable whether the fact that it is signed by the clerk of the state court instead of the clerk of the supreme court or circuit court is sufficient to invalidate it.[22]

The writ of error to a state court must be allowed by the chief justice of the state court or by a justice of the United States supreme court.[23] It does not issue as of right, and upon application to the supreme court for the writ, the court should refuse to allow it where the decision of the federal question complained of was plainly correct.[24] As a matter of practice, an application to the supreme court for a writ to a state court will not be entertained, unless at the request of a member of the court, with the concurrence of his associates.[25]

The writ of error may be directed to any state court in which the record and judgment may be found.[26] It lies to the lower court when the record remains there and the judgment has to be entered there.[27] The rule, apparently, is that if the highest court has, after judgment, sent its record and judgment, in accordance with the law of the state, to an inferior court for safe-keeping, the writ may issue either to the highest court or to the inferior court. If the highest court, in obedience to the writ, procures

road Co., 109 U. S. 107, 27 L. Ed. 873, 3 Sup. Ct. 72.

19 U. S. Sup. Ct. Rule 10.

20 Germain v. Mason, 154 U. S. 588, 20 L. Ed. 689, 14 Sup. Ct. 1170.

21 Bondurant v. Watson, 103 U. S. 280, 26 L. Ed. 447.

22 Miller v. Texas R. R. Co., 153 U. S. 537, 38 L. Ed. 813, 14 Sup. Ct. 874.

23 Northwestern Union Packet Co. v. Home Ins. Co., 154 U. S. 588, 20 L. Ed. 463, 14 Sup. Ct. 1168.

24 Spies v. Illinois, 123 U. S. 164, 31 L. Ed. 80, 8 Sup. Ct. 21, 22. See, also, Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. Ed. 223.

25 Rose's Code Fed. Proc., § 1888 (d); In re Robertson, 156 U. S. 184, 39 L. Ed. 389, 15 Sup. Ct. 324.

26 Gelston v. Hoyt, 3 Wheat. 303, 4 L. Ed. 381.

27 Wedding v. Meyler, 192 U. S. 573, 48 L. Ed. 570, 24 Sup. Ct. 322.

a return of the record and judgment from the inferior court, and makes a return thereof to the supreme court, no further return is necessary. If it fails to do this, the writ may be sent directly to the inferior court.[28] Where, however, the law requires the highest court to retain its own record, the writ should be directed to that court alone, it being the only one authorized to certify the record to the supreme court.[29]

§ 1669. Time for prosecuting writ of error.—It is provided in section 1008 of the Revised Statutes of the United States that "No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: provided, that where a party entitled to prosecute a writ of error or take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal taken, within two years after the judgment, decree, or order, exclusive of the term of such disability." Since section 1003 of the Revised Statutes provides for taking cases by writ of error from state courts in the same manner as from inferior federal courts, the provisions of the section above quoted are held applicable to writs of error to the state courts.[30]

The writ of error must be brought within two years from the date of the final decree or judgment;[31] and failure to sue out the writ within that time is ground for dismissal.[32] A petition for rehearing presented in season and entered by the court delays the running of the statute until the petition is disposed of.[33] A motion filed to set aside a decree by persons not parties to the suit does not, however, suspend the decree so as to extend the time in which the writ must be sued out.[34] A disability which

28 Rose's Code Fed. Proc., § 1888 (c).

29 Atherton v. Fowler, 91 U. S. 148, 23 L. Ed. 267.

30 Polleys v. Black River Imp. Co., 113 U. S. 81, 28 L. Ed. 938, 5 Sup. Ct. 369; Rose's Code Fed. Proc., § 1902 (a).

31 Farrar v. Churchill, 135 U. S. 613, 34 L. Ed. 236, 10 Sup. Ct. 771.

32 Whitsitt v. Union Depot Co., 122 U. S. 363, 30 L. Ed. 1150, 7 Sup. Ct. 1248; Fowler v. Hamill, 139 U. S. 550, 35 L. Ed. 266, 11 Sup. Ct. 663.

33 Northern Pacific R. R. Co. v. Holmes, 155 U. S. 138, 39 L. Ed. 99, 15 Sup. Ct. 28.

34 Sage v. Central R. R. Co., 93 U. S. 419, 23 L. Ed. 933.

will prevent the running of the time for the prosecution of a writ of error, must exist at the date of the final judgment.[35]

§ 1670. Citation.—When the writ is issued by the supreme court to a state court, the citation shall be signed by the chief justice, judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice.[36] The citation is the summons to the opposite party to appear.[37] No special form is required, and it is frequently said not to be jurisdictional.[38] But the citation is essential to the validity of the writ,[39] and when no citation has been issued, and the defendant fails to appear, the writ will be dismissed.[40]

The allowance of the writ and the issuance of the citation must be either by a justice of the supreme court or by the chief justice of the state.[41] Hence, when the writ is allowed by an associate justice of the state supreme court and the citation is signed by him, the appellate court has no jurisdiction, unless it appears that such justice was acting as chief justice *pro tem.*[42]

§ 1671. Function of judge.—When a final judgment in a suit has been rendered in the highest court of a state in which a decision in the suit could be had, and a writ of error has been issued by the clerk of the circuit court of the United States directed to the judges of the court in which the judgment was rendered, commanding that the record be sent before the supreme court of the United States to be there reviewed, the presiding judge of the court in which the judgment was rendered is not compelled as a matter of right, to award a citation to the respondent to appear before the supreme court of the United States to maintain the validity of his judgment; but he may look into the record for the purpose of determining whether in

35 McDonald v. Hovey, 110 U. S. 619, 28 L. Ed. 269, 4 Sup. Ct. 142.

36 U. S. Rev. Stats., § 999; U. S. Comp. Stats., 1901, p. 712.

37 Villabolos v. United States, 6 How. 90, 12 L. Ed. 356.

38 See Rose's Code Fed. Proc., § 927 (a).

39 Kitchen v. Randolph, 93 U. S. 86, 23 L. Ed. 810.

40 United States v. Phillips, 121 U. S. 254, 30 L. Ed. 914, 7 Sup. Ct. 874.

41 Bartemeyer v. Iowa, 14 Wall. 26, 20 L. Ed. 792.

42 Havnor v. New York, 170 U. S. 408, 42 L. Ed. 1087, 18 Sup. Ct. 631.

his opinion the judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation.[43]

The judge of the United States district court for the district of Oregon has no authority, while holding the circuit court of the United States for the district of California, to sign a citation upon a writ of error from the supreme court of the United States to the supreme court of California; nor has he authority to take and approve of the security required in order to make the writ of error a *supersedeas,* and operate as a stay of execution upon the judgment to be reviewed.[44]

FORMS IN WRIT OF ERROR.

§ 1672. Petition for writ of error.

Form No. 491.

In the Supreme Court of the State of California.

[TITLE OF CAUSE.]

Comes now the above-named . . . , appellee, and says: That on the . . . day of . . . , 19 . . , judgment in this case was entered by this court against . . . , appellee, and thereafter a petition for rehearing was filed, presented, considered, and on the . . . day of . . . , 19 . . , denied by this court, whereupon said judgment became final; that said . . . was and is aggrieved in that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States, relating to the mineral lands of the United States, and the control of the same by the department of the interior, and the sale and patenting of same to the citizens of the United States, and under and by virtue of said statutes, the said . . . claims title to and the right to patent certain mineral lands in the state of California, and that, by this action, there was drawn in question, the construction of certain of said statutes, and the decision of this court is against said title and right claimed by the said . . . , appellee, and, as he believes, contrary to the statutes of the United States, relating to the sale and disposition of its mineral lands and against the title and right of said

[43] Greeley v. Townsend, 25 Cal. 608.

[44] Tompkins v. Mahoney, 32 Cal. 231.

. . . , thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said . . . prays that a writ of error may issue to the supreme court of the state of California for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States supreme court.

. . . , Attorneys for . . .

§ 1673. Assignment of error on writ of error to state court.

Form No. 492.

In the Supreme Court of the United States.

[TITLE OF CAUSE.]

Comes now the plaintiff in error in the above-entitled cause, and avers and shows that in the record and proceedings in said cause, the supreme court of the state of California erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice, and against the rights, of the plaintiff in error in the following particulars, to-wit: [Here insert assignments of error.]

Wherefore, for these and other manifest errors appearing in the record, the said . . . , plaintiff in error, prays that the judgment of the said supreme court of California be reversed and set aside, and held for naught, and that judgment be rendered for plaintiff in error, granting him his rights under the statutes and laws of the United States, and plaintiff in error also prays judgment for his costs.

. . . , Attorneys for Plaintiff in Error.

Address: . . .

§ 1674. Allowance of writ.

Form No. 492a.

In the Supreme Court of the State of California.

[TITLE OF CAUSE.]

Comes now . . . , the appellee above-named, on this . . . day of . . . , 19 . . , and files and presents to this court his petition, praying for the allowance of a writ of error intended to be urged by him; and praying further that a duly authenticated transcript of the records, proceedings, and papers upon which the judgment herein was rendered may be sent to the supreme court

of the United States; and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of the said petition, this court desiring to give petitioner an opportunity to test in the supreme court of the United States the questions therein presented, it is ordered by this court that a writ of error be allowed, as prayed; provided, however, that said . . . , appellee, give bond according to law in the sum of two thousand (2,000) dollars, which said bond shall operate as a *supersedeas* bond.

In testimony whereof, witness my hand this . . . day of . . . , 19 . .

. . . , Chief Justice of the Supreme Court
of the State of California.

§ 1674a. Bond on writ of error.

Form No. 492b.

In the Supreme Court of the United States.

[TITLE OF CAUSE.]

Know all men by these presents: That we, . . . , of the county of . . . , state of California, as principal, and . . . and . . . , of the county of . . . , state of California, as sureties, are held and firmly bound unto the above-named . . . in the sum of two thousand (2,000) dollars, to be paid to him, and for the payment of which well and truly to be made, we bind ourselves, and each of us, our, and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the . . . day of . . . , in the year of our Lord one thousand nine hundred and . . .

Whereas, the above-named . . . , plaintiff in error, seeks to prosecute a writ of error in the supreme court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the state of California:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute his writ of error to effect, and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

. . . [SEAL.]
. . . [SEAL.]
. . . [SEAL.]

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } ss.

. . . and . . . , whose names are subscribed as surety to the above bond, being severally and duly sworn, each for himself says: That he is a resident and freeholder of the state of California, and is worth more than the sum in said bond specified as the penalty thereof over and above all his just debts and liabilities, in property not by law exempt from execution in this state.

. . . . . .

. . . . . .

Subscribed and sworn to before me, this . . . day of . . . , 19 . .

. . . , Notary Public.

This bond approved this . . . day of . . . , 19 . .

. . . , Chief Justice of the Supreme Court of the State of California.

§ 1674b. Writ of error.

Form No. 492c.

UNITED STATES OF AMERICA, ss.

The President of the United States to the Honorable the Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition of a judgment, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in said suit between . . . , plaintiff, and . . . , defendant, wherein rights, privileges, and immunities are claimed under the constitution and statutes of the United States and under authority exercised under the United States, and the decision was against the rights, privileges, and immunities specially set up or claimed under such constitution, statutes, and authority, a manifest error has happened, to the great damage of the said . . . , as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the supreme court of the United States, together with this writ, so

that you may have the same at Washington on the . . . day of . . . next, in the said supreme court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said supreme court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the . . . day of . . . , in the year of our Lord one thousand nine hundred and . . .

(Seal of the Supreme Court of the United States.)

JAMES H. MCKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed: . . .

. . . , Asso. Jus. Sup. Ct. U. S.

§ 1674c. Citation on writ of error.

Form No. 492d.

UNITED STATES OF AMERICA, ss.

To . . . , Greeting:

You are hereby cited and admonished to be and appear at a session of the supreme court of the United States, to be holden at Washington on the . . . day of . . . , 19 . . , pursuant to a writ of error filed in the clerk's office of the supreme court of the state of California, wherein . . . is plaintiff and you are defendant, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness, the Honorable . . . , Justice of the said Supreme Court of the United States, this . . . day of . . . , in the year of our Lord one thousand nine hundred and . . .

. . . , Asso. Jus. Sup. Ct. U. S.

Due service of a copy of the within citation is hereby admitted, San Francisco, . . . , 19 . .

. . . , Attorneys for Defendant in Error.

CHAPTER LXI.

APPEALS FROM THE SUPERIOR COURTS TO THE SUPREME COURT.

§ 1675. Grounds for appeal.—An appeal may be taken to the supreme court, from a superior court, in the following cases: 1. From a final judgment entered in an action or proceeding commenced in a superior court, or brought thereto from another court. The appeal may be taken from a portion only of a decree as well as the whole.[1] 2. From an order on motion for a new trial, or granting or dissolving, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from a special order after final judgment, from certain interlocutory judgments, orders, or decrees in actions to redeem property from mortgages or liens. 3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead.[2] When a *remittitur* issues in regular course, the jurisdiction of the supreme court ends.[3] Both the constitution and the statute of South Dakota limit the appellate jurisdiction of the supreme court to a review of the decisions of the

1 State v. Yakey, 48 Wash. 419, 93 Pac. 928.

2 Cal. Code Civ. Proc., § 963, as amended 1901, and § 939, as amended 1907; Solomon v. Reese, 34 Cal. 28; Doherty v. Thayer, 31 Cal. 141.

3 Herlich v. McDonald, 83 Cal. 505, 23 Pac. 710. See Kirby v. Superior Court, 68 Cal. 604, 10 Pac. 119; Heinlen v. Beans, 73 Cal. 240, 14 Pac. 855.

courts.[4] Under the Colorado act of 1885,[4a] regulating appeals to the supreme court, the trial court has no voice whatever in determining whether an appeal will or will not lie in given cases, and the supreme court is the only tribunal to pass upon this question.[5]

The supreme court has appellate jurisdiction in all cases at law and in equity, subject to such limitations and regulations as may be prescribed by law, under which limitations writs of error and appeals may be allowed. The appeals or writs of error must be taken within the limitations and perfected according to the regulations prescribed by statute.[6] Appeal may be taken from special orders after final judgment;[7] but where the trial court, after affirmance of judgment on appeal, makes an order allowing certain costs, and the order does not amend the judgment, it is not appealable, but *certiorari* is the proper procedure.[8] The remedy for erroneously refusing an appeal or *supersedeas* is by *mandamus,* and not by writ of error.[9]

§ 1676. **Other remedy in lower court.**—Objection to a judgment by default for defective service should be taken by special appearance under paragraph 1342 of the Revised Statutes of Arizona, declaring such appearance shall not be held to be a general appearance, or to give the court jurisdiction, or else to move for a new trial, but not by appeal or writ of error, as the supreme court has no jurisdiction.[10] Failure to serve the cost-bill on the unsuccessful party before taxing costs is not appealable, but should be corrected by proceeding in the trial court.[11]

§ 1677. **Different remedies in higher court.**—Whenever the higher court shall dismiss an appeal for lack of jurisdiction, it may order the clerk to enter the same case as pending on writ of error, if the court has jurisdiction of the case upon such writ,[12]

4 Holden v. Haserodt, 3 S. Dak. 4, 51 N. W. 340; affirming 2 S. Dak. 220, 49 N. W. 97.

4a Sess. Laws, 1885, p. 350.

5 Daniels v. Miller, 8 Colo. 542, 9 Pac. 18.

6 Featherman v. Granite County, 28 Mont. 462, 72 Pac. 972.

7 Mont. Rev. Codes, § 7098.

8 State v. District Court, 32 Mont. 20, 79 Pac. 410.

9 Gutierrez v. Territory, 13 N. Mex. 30, 79 Pac. 299; Albright v. Territory, 13 N. Mex. 64, 200 U. S. 9, 26 Sup. Ct. 210, 50 L. Ed. 346, 79 Pac. 719.

10 McLean v. Territory, 8 Ariz. 195, 71 Pac. 926.

11 Jennings v. Frazier, 46 Or. 470, 80 Pac. 1011.

12 Colo. (Mills') Annot. Stats., § 388a.

and this may be done on appellant's failure to file an authenticated copy of the record on appeal, even though the time for suing out a writ of error has elapsed.[13]

§ 1678. Estoppel from appeal.—A party, otherwise entitled to an appeal, may waive that right by a recognition of or an acquiescence in the decision;[14] or by a compliance with the judgment or order;[15] or by a payment of or on the judgment;[16] or by a payment of the costs;[17] or by an acceptance of the benefits of the judgment;[18] or by the enforcement of the judgment or order.[19] But the recognition, acquiescence, or payment may be insufficient to warrant an estoppel.[20] A plaintiff who has made another a defendant cannot have a dismissal of that defendant's appeal on the grounds that he has no appealable interest.[21] An appellant by treating a judgment as final and appealing is estopped to deny its finality.[22]

§ 1679. Two appeals at one time.—Where two appeals are taken by the same party from the same judgment, and no question is raised as to the validity of the first appeal, the second should be dismissed.[23] Where, while an appeal is pending, a new one is taken, and a motion to dismiss is served by respondent,

13 Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

14 Geraghty v. Randall, 18 Colo. App. 194, 70 Pac. 767; Missouri etc. Ry. v. Bagley, 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259; Fidelity & Deposit Co. v. Kepley, 66 Kan. 343, 71 Pac. 818.

15 Knight v. Hirbour, 64 Kan. 563, 67 Pac. 1104; Newman v. Lake, 70 Kan. 848, 79 Pac. 675; Campbell v. Hall, 28 Wash. 626, 69 Pac. 12; Diefenderfer v. State, 13 Wyo. 387, 80 Pac. 667.

16 Black v. Black, and In re Black's Estate, 32 Mont. 51, 79 Pac. 554; Territory v. Cooper, 11 Okla. 699, 69 Pac. 813; Duggan v. Smith, 27 Wash. 702, 68 Pac. 356; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791.

17 Waters v. Garvin, 67 Kan. 855, 73 Pac. 902; San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047.

18 Bechtel v. Evans, 10 Idaho, 147, 77 Pac. 212.

19 First Nat. Bank v. Wakefield, 138 Cal. 561, 72 Pac. 151.

20 Missouri etc. Ry. v. Bagley, 65 Kan. 188, 69 Pac. 189; Newman v. Lake, 70 Kan. 848, 79 Pac. 675; Territory v. Cooper, 11 Okla. 699, 69 Pac. 813; Duggan v. Smith, 27 Wash. 702, 68 Pac. 356; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791; First Nat. Bank v. Wakefield, 138 Cal. 561, 72 Pac. 151.

21 State v. Cranney, 30 Wash. 594, 71 Pac. 50.

22 Costello v. Scott (Nev.), 94 Pac. 222.

23 Swortfiguer v. White, 134 Cal. xx, 66 Pac. 80.

on oral argument appellant's counsel may abandon the first appeal and continue with the second.[24] Separate and independent actions after judgment cannot be joined by order of the trial court, for the purpose of appeal on one petition.[25]

§ 1680. **Successive appeals and cross-appeals.**—If the court of appeals has affirmed the judgment, the appellant cannot sue out a writ of error from the supreme court to the judgment of the district court.[26] If all the questions involved in an appeal from the judgment have been decided on appeal from an order denying a new trial, the appeal will be dismissed.[27] If the case has been heard on appeal and remanded with instructions to modify the judgment, and that is done, a second appeal taken from that judgment will be dismissed.[28] If defendant in error claims certain relief, and the record in error fully presents the matter, he must present his rights by cross-petition in the pending appeal, and not by a subsequent and independent proceeding in error.[29] But a party complaining by cross-petition in error must take preliminary steps giving him the right to assign error, and must present the errors to the trial court, on motion for a new trial.[30] However, if the errors occurred on the trial, and have not been reviewed, the defendant on appeal may sue out another writ of error, by the New Mexico practice.[31] When a second appeal is taken within the time allowed by law, the first appeal is dismissed by operation of law.[32]

§ 1681. **Appeal versus writ of error.**—The supreme court has no jurisdiction to review a judgment of the county court on appeal, but it is expressly authorized to dismiss the appeal and redocket the case on error.[33] The appeal will be dismissed and the case redocketed as pending on a writ of error, if it appears

24 Noble v. Whitten, 34 Wash. 507, 76 Pac. 95.

25 Prinz v. Moses (Kan.), 66 Pac. 1009; Griswold v. Bender, 27 Nev. 369, 75 Pac. 161.

26 Platte Land Co. v. Hubbard, 30 Colo. 40, 69 Pac. 514.

27 Coats v. Harris, 9 Idaho, 470, 75 Pac. 246.

28 Idaho Comstock Co. v. Lundstrum, 9 Idaho, 785, 76 Pac. 762.

29 Scully v. Smith, 66 Kan. 265, 71 Pac. 519.

30 Wheeler v. Caldwell, 68 Kan. 776, 75 Pac. 1031.

31 Armijo v. Neher, 11 N. Mex. 354, 68 Pac. 914.

32 King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

33 Colo. (Mills') Annot. Stats., § 388a; Denver etc. R. R. Co. v. Peterson, 30 Colo. 77, 97 Am. St. Rep. 76, 69 Pac. 578.

that the court would have jurisdiction if the action had originally come up on error.[34]

§ 1682. On appeal from the intermediate court.—The question of plaintiff's right to appeal to the circuit court from a justice's judgment in a forcible entry and detainer action does not arise on appeal to the supreme court from a judgment of the circuit court rendered on an appeal by defendant from a judgment of a justice of the peace.[35]

In absence of a motion in the district court to dismiss an appeal from the probate court on the ground that the claimant filed two separate claims against the estate, on which separate decrees were rendered, and that the record failed to show which of these decrees an appeal was taken from, the motion cannot be first made in the supreme court.[36] The circuit court has considerable latitude in its own discretion as to correcting omissions in the transcript in cases appealed from the justice courts.[37]

§ 1683. Decisions of intermediate courts.—An order sustaining a motion to dismiss an appeal from a justice court is not appealable to the supreme court.[38] An order of the district court reversing a judgment of a justice and retaining the case for trial, where there is no judgment rendered for costs, is not an order from which error lies to the supreme court.[39] The action of a district court in dismissing a case appealed from a justice court for want of prosecution is final, and not subject to review.[40]

Plaintiff cannot appeal from a judgment in his own favor, though it grant insufficient relief, but must proceed by writ of error,[41] and if nothing is adjudged against the party he cannot appeal for the purpose of reviewing any question in the case.[42]

34 Stevens v. Stevens, 31 Colo. 188, 72 Pac. 1060; Brennan Mer. Co. v. Vickers, 31 Colo. 323, 73 Pac. 45; McAllister v. Irwin's Estate, 31 Colo. 253, 73 Pac. 47; Best v. Rocky Mountain Nat. Bank, 31 Colo. 474, 73 Pac. 845; Lockhaven v. United States Mortgage etc. Co., 19 Colo. App. 28, 73 Pac. 409.

35 Dechenbach v. Rima, 45 Or. 500, 77 Pac. 391, 78 Pac. 666.

36 Gillett v. Chavez, 12 N. Mex. 353, 78 Pac. 68.

37 Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 737.

38 Franzman v. Davies, 32 Mont. 251, 80 Pac. 251.

39 McCormick Harvesting Co. v. Kolb, 12 Okla. 1, 74 Pac. 367.

40 Smith v. District Court, 24 Utah, 164, 66 Pac. 1065.

41 Patrick v. Morrow, 18 Colo. App. 222, 70 Pac. 952.

42 Colorado Fuel & Iron Co. v. Knudson, 18 Colo. App. 383, 70 Pac. 698.

§ 1684. Appealable judgments.—A judgment is the final determination of the rights of the parties in an action or proceeding.[43] A judgment, to be final, must give relief by its own force, or be enforceable for that purpose without further action by the court.[44] When an order for judgment has been made and regularly entered by the clerk, and judgment has been drawn up, signed by the judge and filed with the clerk, final judgment has been rendered.[45] And where a cause has been regularly heard and decided, it can be reviewed only in the modes provided by the statute.[46] The judgment of an inferior court is final, in the sense indicated above, although the litigation may be continued in a higher court upon appeal; but the judgment of a court of last resort is final in another sense, as it conclusively ends the litigation, unless it remands the case to the court below for further proceedings, new trial, or the like. A judgment of the supreme court affirming the judgment below is final,[47] but not on an incidental matter collateral to the suit.

A judgment by default is a final judgment; and as to the right of appeal, there is no distinction between judgments by default and those after issue joined and a trial.[48] On an appeal from a judgment by default not taken within sixty days after its entry, nothing can be reviewed except what appears on the judgment-roll.[49] If the complaint exhibits no cause of action, a judgment by default will be reversed.[50] But the default confesses all the material facts in the complaint.[51] In New York, the practice differs, and an appeal does not lie from a judgment by default.[52] So, in Nevada, an appeal will not lie from a

43 Cal. Code Civ. Proc., § 577; In re Smith, 98 Cal. 636, 33 Pac. 744.

44 Bondurant v. Apperson, 4 Metc. (Ky.) 30. See In re Smith, 98 Cal. 636, 33 Pac. 744.

45 Gray v. Palmer, 28 Cal. 416; Griswold v. Bender, 27 Nev. 369, 75 Pac. 161; Wagstaff v. Wagstaff, 67 Kan. 832, 72 Pac. 780.

46 Carpenter v. Superior Court, 75 Cal. 596, 19 Pac. 174.

47 Mulford v. Estudillo, 32 Cal. 131.

48 Stevens v. Ross, 1 Cal. 94; Burt v. Scrantom, 1 Cal. 416; State v. Woodlief, 2 Cal. 241; Hallock v. Jaudin, 34 Cal. 167; Holman v. Sigourney, 11 Metc. 436; Ball v. Burke, 11 Cush. 80; Henderson v. Gibson, 19 Md. 234.

49 Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624; McDonald v. Swett, 76 Cal. 257, 18 Pac. 324.

50 Abbe v. Marr, 14 Cal. 210; Choynski v. Cohen, 39 Cal. 502, 2 Am. Dec. 476.

51 Rowe v. Table Mountain etc. Co., 10 Cal. 444.

52 See N. Y. Code Civ. Proc., 1877, § 1294; Flake v. Van Wagenen, 54 N. Y. 25; Miller v. Tyler, 58 N. Y. 477; Innes v. Purcell, 58 N. Y. 388.

judgment by default,[53] unless irregularly and erroneously entered.[54]

§ 1685. Case stated.—An appeal lies from a judgment upon an agreed statement of facts, on an *audita querela*.[55] From judgment on a case submitted in writing for trial, without the intervention of a jury, if no exceptions are taken, no appeal lies.[56] Where judgment is given on the pleadings in an equity case, an appeal may be maintained therefrom, though no exception is taken.[57]

§ 1686. Case submitted without action.—A case submitted without action[58] may be determined and judgment rendered thereon as if an action was pending, and is subject to appeal.[59] The case, the submission, and a copy of the judgment constitute the judgment-roll.[60] But the supreme court will not decide abstract cases disconnected from the granting of actual relief.[60a]

When there is no final judgment no appeal can be taken.[61] And a judgment to be final must dispose of the case as to all of the parties, and finally dispose of the subject-matter of the litigation.[62] No appeal can be taken before the judgment is entered.[63] An appeal from a judgment prior to its entry is premature, and will be dismissed.[64] Where a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside.[65]

53 Paul v. Armstrong, 1 Nev. 82.

54 Kidd v. The Four Twenty Mfg. Co., 3 Nev. 381.

55 Hovey v. Crane, 10 Pick. 440; Parker v. Inhabitants of Framingham, 8 Metc. 260; Furlong v. Leary, 8 Cush. 409; White v. Clapp, 8 Allen, 283.

56 Bass v. Haverhill Ins. Co., 10 Gray, 400.

57 Travis v. Ward, 2 Wash. 30, 25 Pac. 908.

58 Under Cal. Code Civ. Proc., § 1138.

59 Cal. Code Civ. Proc., § 1140.

60 Cal. Code Civ. Proc., § 1139.

60a Harman v. Burt, 20 Okla. 509, 94 Pac. 528.

61 Durant v. Comegys, 3 Idaho, 67, 26 Pac. 755.

62 Watkins v. Mason, 11 Or. 72, 4 Pac. 524; Johnson v. Lighthouse, 8 Wash. 32, 35 Pac. 403; Schultz v. McLean, 76 Cal. 608, 18 Pac. 775; Mignon v. Brinson, 74 Tex. 18, 11 S. W. 903; Champ v. Kendrick, 130 Ind. 545, 30 N. E. 635.

63 Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 302.

64 Onderdonk v. San Francisco, 75 Cal. 534, 17 Pac. 678; Coon v. Grand Lodge Order of Honor, 76 Cal. 354, 18 Pac. 384.

65 Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396; Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175. See Ah Kle v. McLean, 3 Idaho, 70, 26 Pac. 937; Sutton v. Symons, 100 Cal. 576, 35 Pac. 158; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103.

§ 1687. Consent.—A judgment or order entered by consent is not appealable,[66] not even under a stipulation to that effect.[67] Mere passiveness or silence is not consent such as to bar an appeal.[68] A stipulation not to appeal will be enforced.[69] But such agreement must be based on some consideration, or the facts must estop the party from exercising the right.[70] An entry noting the filing of an agreement to dismiss is not a dismissal from which appeal can be taken.[71]

§ 1688. Costs.—An appeal involving no question but that of costs will be dismissed on motion.[72] A judgment for plaintiff for costs only may be appealed from;[73] but where the controversy is over title to land, and both parties come to an agreement and jointly convey the land, an appeal on the question of costs alone should be dismissed.[74] The rule that the supreme court will not entertain an appeal on mere matters of costs applies only to the parties, and not to their sureties on cost-bond,[75] and even though the amount be less than two hundred dollars.[76] In Massachusetts, if the court of common pleas disallowed the defendant's motion for costs upon a discontinuance of a suit, an appeal would lie.[77] Where judgment was rendered for de-

66 Meerholz v. Sessions, 9 Cal. 277; approved in Brotherton v. Hart, 11 Cal. 405; Erlanger v. Southern Pacific R. R. Co., 109 Cal. 395, 42 Pac. 31; Mills v. Brown, 16 Pet. 525, 10 L. Ed. 1051; Sampson v. Welsh, 24 How. 207, 16 L. Ed. 632; Lambert v. Moore, 1 Nev. 231; Boyd v. Bigelow, 14 How. Pr. 511; Van Wormer v. Mayor of Albany, 18 Wend. 169; O'Dougherty v. Aldrich, 5 Denio, 385; Rader v. Barr, 22 Or. 495, 29 Pac. 889; Port v. Parfit, 4 Wash. 369, 30 Pac. 328.

67 Kelsey v. Forsyth, 21 How. 85, 16 L. Ed. 32; Jarvis v. Palmer, 1 Barb. Ch. 379; Perkins v. Farnham, 10 How. Pr. 120.

68 San Francisco v. Certain Real Estate, 42 Cal. 518.

69 Townsend v. Masterson Stone D. Co., 15 N. Y. 587.

70 Ogdensburg etc. R. R. Co. v. Vermont etc. R. R. Co., 63 N. Y. 176.

71 Kinman v. Scheuer, 30 Mont. 73, 75 Pac. 690.

72 Samona v. Odessa State Bank, 35 Wash. 113, 76 Pac. 534; Mares v. Dillon, 196 U. S. 644, 49 L. Ed. 629, 25 Sup. Ct. 797, 30 Mont. 144, 75 Pac. 969; King v. Allen, 29 Mont. 5, 73 Pac. 1107; Jensen v. Sheard, 49 Wash. 593, 96 Pac. 2.

73 Meeker v. Harris, 23 Cal. 285; McDaniels v. Johnson, 36 Vt. 687; McGregor v. Comstock, 19 N. Y. 581. Cases in which it is said no appeal will lie upon a mere question of costs, as being in the discretion of the court, are Rogers v. Holly, 18 Wend. 350; Eastburn v. Kirk, 2 Johns. Ch. 317; Travis v. Waters, 12 Johns. 500.

74 Travers v. McLees, 32 Wash. 258, 73 Pac. 371.

75 Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105; Van Buskirk v. Balch, 19 Colo. App. 292, 74 Pac. 792; Smith v. Palmer, 38 Wash. 276, 80 Pac. 460.

76 Hamilton v. Witner, 50 Wash. 689, 126 Am. St. Rep. 921, 97 Pac. 1084.

77 Gilbreth v. Brown, 15 Mass. 178.

fendant for cost, "but no final determination of the rights of the parties in the action," it is not a final judgment, and no appeal will lie.[78] In an action for libel the plaintiff recovered a verdict for one hundred dollars. The plaintiff filed his bill of costs, amounting to two hundred and seventy-eight dollars, and had judgment for verdict and costs. Defendant moved to strike out the cost-bill from the files, because the verdict was for less than three hundred dollars. The motion was denied. On appeal from the order denying the motion, it was held that the motion, if granted, would have effected a modification of the judgment, and that the order refusing the motion could only be reviewed on an appeal from the judgment.[79]

§ 1689. Frivolous matters.—A purely academic question will not be reviewed on appeal.[80] Nor can defendant appeal from a restraining order, if he goes on and awards contracts in a manner satisfactory to the plaintiff. There is no real controversy and the supreme court acquires no jurisdiction.[81] If the term of a public office expires before hearing of an appeal from contest of such office, the appeal should be dismissed.[82]

§ 1690. Nonsuit.—An appeal lies from a judgment of nonsuit; but an appeal will not lie from a judgment after a new trial has been granted,[83] or from judgment of nonsuit entered on the motion of the party;[84] or from an order denying a motion to vacate and set aside a judgment of dismissal.[85] But where the party dismissing an action has been allowed to withdraw costs previously paid into court, there may be an appeal.[86] A party who voluntarily dismisses his action, and causes judgment to be rendered thereon, cannot prosecute an appeal from such judgment.[87] An order refusing a nonsuit is not appealable.[88] No motion for new trial is necessary.[89]

78 McAlpin v. Bennett, 21 Tex. 535; Walmer v. Schulenberger, 23 Ind. 454.

79 Flubacher v. Kelly, 49 Cal. 116; citing Lasky v. Davis, 33 Cal. 677.

80 Scott v. Sheehan, 145 Cal. 691, 79 Pac. 353.

81 Snell v. Welch, 28 Mont. 482, 72 Pac. 988.

82 State v. Cummings, 27 Wash. 316, 67 Pac. 565.

83 Kower v. Gluck, 33 Cal. 401.

84 Imley v. Beard, 6 Cal. 666; Sleeper v. Kelly, 22 Cal. 456; Van Wormer v. Mayor of Albany, 18 Wend. 169; O'Dougherty v. Aldrich, 5 Denio, 385.

85 Alpers v. Bliss, 145 Cal. 565, 79 Pac. 171.

86 Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

87 Liebmann v. McGraw, 3 Wash. 520, 28 Pac. 1107.

88 Witkowski v. Hern, 82 Cal. 604, 23 Pac. 132.

89 Cravens v. Dewey, 13 Cal. 42.

§ 1691. **Partition.**—An appeal may be taken from such interlocutory judgment, in actions for partition, as determines the rights and interests of the respective parties, and directs partition to be made.[90] If the interlocutory judgment in partition adjudges that one of the parties has no interest in the property, it is not a final judgment as to him, from which he can appeal.[91] In Massachusetts, the judgment accepting the report of commissioners in a petition for partition is not appealable.[92] In Missouri, a decree that partition be made between the parties is interlocutory, and no appeal will lie.[93] A decree in a partition suit which ascertains and determines the rights of the parties, and leaves nothing for the court to do but to carry the decree into effect by the appointment of referees, etc., is a final decree, and is appealable.[94]

§ 1692. **Special proceedings.**—A judgment finding the amount due on a mortgage, and directing a sale of the mortgaged premises, may be appealed from.[95] In a proceeding to condemn land, the decision of the court by which the merits of the matter are finally determined is a final judgment in a special proceeding, from which an appeal can be taken, and cannot be reviewed on writ of error.[96] A judgment of the supreme court, compelling a board of supervisors to execute and deliver to the Central Pacific Railroad Company bonds of said city and county, as specified in the act of California of April 22, 1863, was a final judgment.[97] An appeal may be taken from a judgment rendered by the trial judge at chambers in an action of *mandamus, certiorari,* or *quo warranto,* or in a special proceeding to try the validity of a corporation election.[98]

90 Cal. Code Civ. Proc., § 963.

91 Peck v. Vandenberg, 30 Cal. 11. But see the section of the code, cited supra.

92 Pierce v. Oliver, 13 Mass. 211. But see Rev. Stats. Mass. ch. 103, § 19.

93 McMurtry v. Glascock, 20 Mo. 432; Stephens v. Hume, 25 Mo. 349.

94 Walker v. Goldsmith, 14 Or. 125, 12 Pac. 537.

95 Swan's Pr. & Pl. 238.

96 Sacramento etc. R. R. Co. v. Harlan, 24 Cal. 334; San Francisco etc. R. R. Co. v. Mahoney, 29 Cal. 112; California etc. R. R. Co. v. Southern Pacific R. R. Co., 65 Cal. 295, 4 Pac. 13. See Eureka etc. R. R. Co. v. McGrath, 74 Cal. 49, 15 Pac. 360.

97 People v. Coon, 25 Cal. 635.

98 Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Granite Mountain Min. Co. v. Weinstein, 7 Mont. 346, 17 Pac. 108.

§ 1693. Void judgment.—An appeal may be taken from a void judgment.[99] One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times.[100] An appeal will lie from that part only of a decree of divorce in favor of the plaintiff which awards the care, custody, and control of the children to the defendant, regardless of the power of the lower court to modify its decree in that respect.[101] A defendant is not aggrieved by an injunction which is void for want of service of summons, and cannot appeal therefrom;[102] or by a void judgment against sureties on appeal-bond.[103]

§ 1694. Appealable decrees.—To authorize an appeal, the decree must be final on all matters within the pleadings, so that the affirmance of the decree will end the suit.[104] The test of finality of a judgment for the purpose of appeal is whether the particular proceeding or action is terminated.[105] A decree providing for the subsequent collection of money, sale of stock, and payment in accordance with the decree, is still a final decree.[106] A decree is final if it decide the ownership of the property in suit, and directs its immediate transfer, though accounts remain to be taken between the parties.[107] A decree adjudging

99 Hastings v. Burning Moscow Co., 2 Nev. 93; Gormly v. McIntosh, 22 Barb. 271; Commonwealth v. O'Neil, 6 Gray, 343; Trullenger v. Todd, 5 Or. 36; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; Garr v. Spaulding, 2 N. Dak. 414, 51 N. W. 867; Sioux Falls Nat. Bank v. McKee, 3 S. Dak. 1, 50 N. W. 1057; Stewart v. Lohr, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457. That an appeal will lie from a judgment rendered on Sunday, although such judgment is a nullity, see Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. 140; City of Parsons v. Lindsay, 41 Kan. 336, 13 Am. St. Rep. 290, 21 Pac. 227, 3 L. R. A. 658. Compare Malone v. Clark, 2 Hill, 657; Randall v. Hall, Hill & D. Supp. 239; Edwards v. Russell, 21 Wend. 63; Striker v. Mott, 6 Wend. 465; Fairbanks v. Corlies, 1 Abb. Pr. 150.

100 Kamp v. Kamp, 59 N. Y. 212. That appeal will lie from part of a judgment, see Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588; Inverarity v. Stowell, 10 Or. 261; Healy v. Seward, 5 Wash. 319, 31 Pac. 874. Or from part of a decree, see Shook v. Colohan, 12 Or. 239, 6 Pac. 503. Or from part of an order, see In re Davis' Estate, 11 Mont. 1, 27 Pac. 342.

101 Luck v. Luck, 83 Cal. 574, 23 Pac. 1035.

102 McGinniss v. Boston & M. Cons. etc. Co., 29 Mont. 428, 75 Pac. 89.

103 Churchill v. More, 7 Cal. App. 767, 96 Pac. 108.

104 Perkins v. Fourniquet, 6 How. 206, 209, 12 L. Ed. 406; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332.

105 Winnovrich v. Emery, 33 Utah, 345, 93 Pac. 988.

106 Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508.

107 Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94. See Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404.

that the defendant pay a certain sum into court, or in default thereof that a receiver be appointed, is a final decree.[108] A decree of the district court in admiralty, refusing to order the sale of a vessel as petitioned by one of two part owners, is a final decree.[109] The decrees in the district court on California land surveys under the acts of Congress are final.[110] From a decree rendered in a suit for divorce an appeal lies;[111] and a decree for the foreclosure and sale of mortgaged premises is a final decree before the return and confirmation.[112] But an allowance for the support of a child in a decree of divorce is an incident to the decree, and is not a final judgment that may be appealed from.[113] An appeal will lie from a confirmation of a sale in a mortgage case.[114] A decree in a suit to enjoin trustees from selling, dissolving an injunction before granted, and ordering that they shall sell and bring the proceeds into court to abide further orders, is a final decree, from which an appeal lies, within the meaning of the act of 1803.[115]

§ 1695. **Non-appealable decrees.**—In chancery a decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision. But when a decree finally decides and disposes of the whole merits of the cause, it is a final decree.[116] Refusal to dismiss an action is not a final order.[117] If appellant treats a judgment as final and appeals, he is estopped from denying its finality.[118] A decree ordering a reference and an accounting, and reserving all other matters in controversy, is not final.[119] A general decree, before the

108 Wabash etc. Canal Co. v. Beers, 1 Black, 54, 17 L. Ed. 41; Heroy v. Gibson, 10 Bosw. 591; Bailey v. Lane, 15 Abb. Pr. 373, note.

109 Davis v. The Seneca, Gilp. 34, Fed. Cas. No. 3651.

110 United States v. Billings, 2 Wall. 444, 17 L. Ed. 848; The Fossat Case, 2 Wall. 649, 17 L. Ed. 739.

111 Conant v. Conant, 10 Cal. 249, 70 Am. Dec. 717.

112 Whiting v. Bank of the United States, 13 Pet. 6, 10 L. Ed. 33; Bronson v. Railroad Co., 2 Black, 524, 17 L. Ed. 347; Ray v. Law, 3 Cranch, 179, 2 L. Ed. 404; Railroad Co. v. Soutter, 2 Wall. 440, 17 L. Ed. 860; Tripp v. Cook, 26 Wend. 143.

113 Thomson v. Thomson, 5 Utah, 401, 16 Pac. 400.

114 Hey v. Schooley, 7 Ohio, 48, pt. 2; Kern's Admr. v. Foster, 16 Ohio, 274.

115 Railroad Co. v. Bradleys, 7 Wall. 575, 19 L. Ed. 274.

116 Mills v. Hoag, 7 Paige, 18; Beebe v. Russell, 19 How. 283, 15 L. Ed. 668.

117 State v. Superior Court, 48 Wash. 671, 94 Pac. 472.

118 Costello v. Scott (Nev.), 94 Pac. 222.

119 Id.; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Dows v. Congden, 28 N. Y. 122.

funds are collected, that they shall be distributed among certain parties, and appointing a master to state an account, is not a final decree.[120] A decree of the supreme court, simply reversing the decree made by an inferior court, and remitting the cause for further proceedings, is not final.[121] Where restitution, with costs and damages, have not been assessed, the decree is not final.[122] A decree that a sum of money is due, but leaving the amount dependent upon other claims, is not final.[123] An interlocutory decree in an action to enforce a trust is not appealable.[124] Where the decree of the district court was not final, the circuit court, to which the cause was taken by appeal, had no power to act upon the case, nor could it consent to an amendment of the record by the insertion of a final decree by agreement nor can the supreme court consent to such an amendment.[125] A supplemental decree of sale is but a decree in execution of the original decree, and not final;[126] nor is a subsequent decree of possession, to put buyer in possession of property sold.[127] An *ex parte* order in a partition suit, for issuance of a writ of assistance, is as plainly in aid of the order of sale as the order of confirmation, and must be considered, for the purpose of appeal, an order made after final judgment, and the proper procedure is to move to vacate the order for issuance of a writ of assistance and appeal from the order of denial.[128] A decree dismissing a cross-bill alone is not final.[129]

§ 1696. Appealable orders.—There are certain orders which by the statute are made appealable, while others can only be

120 Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. Ed. 349.

121 The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; Chase v. Vasquez, 11 Wheat. 429, 6 L. Ed. 511; Barnard v. Gibson, 7 How. 650, 12 L. Ed. 857; Coffee v. Planters' Bank, 13 How. 183, 14 L. Ed. 105; Craighead v. Wilson, 18 How. 199, 15 L. Ed. 332; Harvey v. Richards, 2 Gall. 216, Fed. Cas. No. 6182; Pepper v. Dunlap, 5 How. 51, 12 L. Ed. 46; Humiston v. Stainthrop, 2 Wall. 106, 17 L. Ed. 905; Winn's Heirs v. Jackson, 12 Wheat. 135, 6 L. Ed. 577; Corning v. Troy Iron & Nail Factory, 15 How. 451, 14 L. Ed. 768; Griffin v. Orman, 9 Fla. 22; Owens v. Love, 9 Fla. 325.

122 The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; distinguishing Ray v. Law, 3 Cranch, 179, 2 L. Ed. 404; Chase v. Vasquez, 11 Wheat. 429, 6 L. Ed. 511.

123 Montgomery v. Anderson, 21 How. 386, 16 L. Ed. 160.

124 Duff v. Duff, 71 Cal. 513, 12 Pac. 570.

125 Mordecai v. Lindsay, 19 How. 199, 15 L. Ed. 624.

126 Carr v. Hoxie, 13 Pet. 460, 10 L. Ed. 247.

127 Callan v. May, 2 Black, 541, 17 L. Ed. 282.

128 Gordon v. Graham, 153 Cal. 297, 95 Pac. 145.

129 Ayres v. Carver, 17 How. 591,

reviewed upon an appeal from the judgment.[130] Intermediate orders, which are not appealable, may be reviewed, if excepted to, upon appeal from the judgment.[131] An order overruling a demurrer may be appealed from, but, if waived, appeal cannot then be had until after final judgment.[132] In California, such an order is not appealable.[133] An order made by the court, on a motion, is a final adjudication upon the subject-matter, unless appealed from within the statutory time.[134] So an order or judgment upon an award, when such order or judgment is founded upon matter of law apparent on the record, may be appealed from.[135] Any judgment, order, or decree which puts an end to the proceedings may be appealed from; as an order of the county court dismissing an appeal.[136] Whether an order is appealable is to be determined by what it purports to determine, and not by what may be its actual operative effect.[137]

An order appointing a receiver of a corporation in a suit by stockholders, the object being to sell and preserve the property of the corporation, is a final decree for the purposes of appeal;[138] likewise, in appointment of a receiver for a partnership in a suit for dissolution.[139]

§ 1697. Amendment.—An order authorizing the insertion in a complaint of an entirely different cause of action involves a substantial right, and is appealable.[140] In New York, an appeal will not lie from an order granting or refusing an amendment,[141]

15 L. Ed. 179. See Scheiffelin v. Weatherred, 19 Or. 172, 23 Pac. 898.

130 Cal. Code Civ. Proc., § 939, subd. 3, and § 963, subd. 2; N. Y. Code Civ. Proc., § 1347.

131 Hibberd v. Smith, 39 Cal. 145; Agard v. Valencia, 39 Cal. 292; Lowell v. Parkinson, 4 Utah, 64, 6 Pac. 58.

132 Hale v. Broe, 18 Okla. 147, 90 Pac. 5.

133 Cal. Code Civ. Proc., § 939; Litch v. Kerns, 8 Cal. App. 747, 97 Pac. 897.

134 Kittredge v. Stevens, 23 Cal. 283.

135 Skeels v. Chickering, 7 Mete. 316; Ward v. President of American Bank, 7 Mete. 486.

136 Zoller v. McDonald, 23 Cal. 136.

137 In re Bullock, 75 Cal. 419, 17 Pac. 540.

138 California Fruit Grower's Association v. Superior Court, 8 Cal. App. 711, 97 Pac. 769.

139 Costello v. Scott (Nev.), 94 Pac. 222.

140 Sheldon v. Adams, 41 Barb. 54, 18 Abb. Pr. 405.

141 New York Ice Co. v. North Western Ins. Co., 23 N. Y. 357. 21 How. Pr. 296; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Binnard v. Spring, 42 Barb. 470; Thompson v. Kessel, 30 N. Y. 383; McCarty v. Edwards, 24 How. Pr. 236; Mitchell v. Van Buren, 27 N. Y. 300; Walsh v. Washington Ins. Co., 32 N. Y.

or imposing terms on granting an amendment,[142] or modifying judgment after actual entry.[143]

§ 1698. Attachment.—From an order dissolving or refusing to dissolve an attachment, an appeal will now lie, [144] but not so in New Mexico and Oklahoma.[145] A judgment giving priority to one creditor over another as to attached funds of a debtor, but not distributing or giving any other relief to the parties, is not a final order.[146] An order, after final judgment, refusing to release attached property is appealable.[147] An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment, decree, or final order from which an appeal will lie, under the Oregon code.[148]

§ 1699. Bill of particulars.—An order directing a bill of particulars, as regards extent to which they are to be furnished, is appealable.[149] But refusal to allow service of such bill of particulars after time expired is discretionary, and not appealable.[150]

§ 1700. Contempt.—A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a superior court.[151] In a later case it was held that an appeal may be taken from a judgment for contempt, where the fine imposed is for three hundred dollars, and the court below has exceeded its jurisdiction; the question of jurisdiction being always open for review, and that where all the facts do not ap-

427. See, also, Owen v. McCormick, 5 Mont. 255, 5 Pac. 280.

142 Schermerhorn v. Wood, 30 How. Pr. 316; Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166.

143 Butler v. Niles, 28 How. Pr. 181. But see Bryan v. Berry, 8 Cal. 130; Code Civ. Proc., § 939.

144 Cal. Code Civ. Proc., § 939, changing the practice as reported in Allender v. Fritts, 24 Cal. 447; Howell v. Kingsbury, 15 Wis. 272; Quebec Bank v. Carroll, 1 S. Dak. 1, 44 N. W. 723; Red River Nat. Bank v. Freeman, 1 N. Dak. 196, 46 N. W. 36; Rice v. Jereuson, 54 Wis. 250, 11 N. W. 549. See Vaughn v. Dawes, 7 Mont. 360, 17 Pac. 114; Martin v. Maxey, 14 Mont. 85, 35 Pac. 667; Flagg v. Puterbaugh, 101 Cal. 584, 36 Pac. 95.

145 Jung v. Myer, 11 N. Mex. 378, 68 Pac. 933; Machen v. Keeler, 11 N. Mex. 413, 68 Pac. 937; F. Westheimer & Sons v. Hahn, 15 Okla. 49, 78 Pac. 378.

146 Hanson v. Bowyer, 4 Metc. (Ky.) 108.

147 Coey v. Cleghorn, 10 Idaho, 162, 77 Pac. 331.

148 Van Voorhies v. Taylor, 24 Or. 247, 33 Pac. 380.

149 Mason v. Ring, 10 Bosw. 598.

150 Goings v. Patten, 1 Daly, 168, 17 Abb. Pr. 339.

151 Ex parte Rowe, 7 Cal. 175. That appeal will lie, see Ware v. Robinson, 9 Cal. 107.

pear of record, and would not be brought up on *certiorari*, appeal upon a statement is the proper remedy.[152] But the point was not decided whether a judgment for contempt rendered by a court having jurisdiction to render it may be reviewed for mere error.[153] It is now settled that no appeal lies from a judgment rendered in a case of contempt.[154] Under the Colorado practice contempt proceedings may be brought to the supreme court upon writ of error from the final judgment, but the review upon such writ extends only to an inquiry into the jurisdiction of the court entering the judgment.[155]

§ 1701. **Decree, setting aside.**—An appeal lies from an order setting aside a decree in equity, and granting a rehearing.[156] In Pennsylvania, an order founded on a previous decree to pay money cannot be appealed from.[157]

§ 1702. **Dismissal of action.**—An order dismissing an action for delay in serving the summons, though not entered in the judgment-book,[158] or after issue joined, is appealable;[159] likewise from a judgment, upon a plea of abatement.[160] Any order having the effect to discontinue an action is appealable.[161] But an appeal will not lie from a judgment dismissing an action for want of prosecution.[162] A judgment sustaining a demurrer and dismissing the complaint as to one of several defendants is a final judgment from which an appeal will lie.[163] So an appeal will lie

152 People v. O'Neill, 47 Cal. 109.

153 See Aram v. Shallenberger, 42 Cal. 275, People v. King, 9 How. Pr. 97.

154 Tyler v. Connolly, 65 Cal. 30, 2 Pac. 414; Sanchez v. Newman, 70 Cal. 210, 11 Pac. 645; In re Vance, 88 Cal. 262; 26 Pac. 101; overruling People v. O'Neill, 47 Cal. 109.

155 Cooper v. People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430.

156 Riddle v. Baker, 13 Cal. 295; Michigan Ins. Co. v. Whittimore, 12 Mich. 311; Thompsin v. Robbins, 32 Wash. 149, 72 Pac. 1043.

157 Chew's Appeal, 3 Grant, 294.

158 Marks v. Keenan, 140 Cal. 33, 73 Pac. 751; Pacific Paving Co. v. Vizelich, 141 Cal. 4, 74 Pac. 352.

159 Purple v. Clark, 5 Pick. 206. See, also, Heegaard v. Dakota etc. Trust Co., 3 S. Dak. 569, 54 N. W. 656; Gaines v. Cyrus, 23 Or. 403, 31 Pac. 833; Van Horne v. Watrous, 10 Wash. 525, 39 Pac. 136; Nevada Central R. R. Co. v. District Ct., 21 Nev. 409, 32 Pac. 673; Hoskins v. McGirl, 12 Mont. 246, 29 Pac. 1120; Adams v. Smith, 6 Dak. 94, 50 N. W. 720.

160 Browning v. Bancroft, 5 Metc. 88; Morey v. Whittenton Mills, 8 Cush. 374.

161 Wagnitz v. Ritter, 31 Wash. 343, 71 Pac. 1035.

162 Pacific Supply Co. v. Brand, 7 Wash. 357, 35 Pac. 72.

163 Stevenson v. Matteson, 13 Mont. 108, 32 Pac. 291.

where dismissal was on matters of law apparent on the record.[164] If an action is improperly dismissed by the plaintiff, the defendant's remedy is by appeal from the judgment, and not by motion to set it aside.[165]

§ 1703. **Foreclosure.**—In Wisconsin, an order that an action for the foreclosure of a mortgage should be referred for the purpose of taking testimony involves the merits of the action, and may be appealed from.[166]

§ 1704. **Injunction.**—An appeal may be taken from an order granting or dissolving, or refusing to grant or dissolve, an injunction.[167] An order which modifies, and thereby partially dissolves, an injunction is appealable.[168] An order overruling a motion to dissolve a preliminary injunction, and to vacate an order appointing a receiver in a suit for the dissolution of a partnership, and for an accounting, is not appealable.[169] An order dissolving the mandatory part of an injunction is appealable.[170] An appeal from an interlocutory order granting a temporary injunction will not be sustained when such order was superseded by a final decree before appeal taken.[171] So it seems a decree for an injunction in a patent case, and a reference to a master to take an account of profits, is not final.[172] So a decree merely dissolving an injunction, without dismissing the bill, is not final.[173] No appeal lies from an order vacating a temporary injunction, if the party enjoined does not appear to be insolvent;[174] but appeal

164 Hovey v. Crane, 10 Pick. 440; Bowler v. Palmer, 2 Gray, 553.

165 Higgins v. Mahoney, 50 Cal. 444.

166 Oatman v. Bond, 15 Wis. 20.

167 Cal. Code Civ. Proc., § 939. See Helm v. Gilroy, 20 Or. 517, 26 Pac. 851; Washington etc. R. R. Co. v. Cœur D'Alene etc. Nav. Co., 2 Idaho, 439, 17 Pac. 142; McGinniss v. Boston & M. Cons. etc. Min. Co., 29 Mont. 428, 75 Pac. 89; Neuman v. Moretti, 146 Cal. 31, 79 Pac. 512. Contra, see, Wagstaff v. Wagstaff, 67 Kan. 832, 72 Pac. 780.

168 Blue Bird Min. Co. v. Murray, 9 Mont. 468, 23 Pac. 1022. But see Northern Pacific R. R. Co. v. Wells Fargo & Co., 2 Wash. T. 303, 5 Pac. 215; Mahncke v. City of Tacoma, 1 Wash. 18, 23 Pac. 804.

169 Basche v. Pringle, 21 Or. 24, 26 Pac. 863.

170 Wolf v. Board of Supervisors, 143 Cal. 333, 76 Pac. 1108.

171 Esterbrook v. Upton, 1 Nev. 398.

172 Bernard v. Gibson, 7 How. 650, 12 L. Ed. 857; distinguishing Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404.

173 McCollum v. Eager, 2 How. 61, 11 L. Ed. 179; Young v. Grundy, 6 Cranch, 51, 3 L. Ed. 149; Hiriart v. Ballou, 9 Pet. 156, 9 L. Ed. 85; Gibbons v. Ogden, 6 Wheat. 448, 5 L. Ed. 302; Brown v. Swann, 9 Pet. 1, 9 L. Ed. 29.

174 Anderson v. McGregor, 36 Wash. 124, 78 Pac. 776.

does not lie to an order of temporary injunction.[175] A decree of the highest court of a state, affirming the decretal order of a state court refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the meaning of the twenty-fifth section of the Judiciary Act of 1789, from which an appeal lies to the supreme court of the United States.[176]

§ 1705. Judgment, entry of.—An order allowing a motion for the signing of a judgment *nunc pro tunc,* improperly allowed, is appealable.[177] Where the time for appeal runs from the time of entry, a decree of distribution is not entered at the time when made by the judge and entered in the rough minutes, but when the decree is entered in the minute-book at length; and the certificate of the clerk to the effect that the certain decree was "on file and of record" is not a certificate that the decree is entered.[178] Orders setting aside or refusing to set aside judgments or sales under them are, in Wisconsin, appealable.[179] So in Nevada.[180] An appeal lies from an order of the court below changing the judgment.[181] The practice in New York seems to be different.[182] An order setting aside a default before entry of judgment thereon, is not appealable, it not being an order after judgment or an interlocutory order, within section 963 of the Code of Civil Procedure.[183] An order denying a motion to set aside a judgment by default is appealable.[184] But no appeal lies from an order refusing to vacate an appealable order.[185]

175 State v. Superior Court, 28 Wash. 403, 68 Pac. 865.

176 Gibbons v. Ogden, 6 Wheat. 448, 5 L. Ed. 302.

177 Fairchild v. Dean, 15 Wis. 206.

178 In re More's Estate, 143 Cal. 493, 77 Pac. 407.

179 Carney v. La Crosse R. R. Co., 15 Wis. 503; Jesup v. City Bank of Racine, 15 Wis. 604, 82 Am. Dec. 703.

180 Ballard v. Purcell, 1 Nev. 342; Maynard v. Johnson, 2 Nev. 16. In New York, see Mortimer v. Nash, 17 Abb.. Pr. 229, note. In Washington, see Myers v. Landrum, 4 Wash. 762, 31 Pac. 33; Northern Pacific R. R. Co. v. Black, 3 Wash. 327, 28 Pac. 538; Whidby Land etc. Co. v. Nye, 5 Wash. 301, 31 Pac. 752; Seattle etc. Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567. In South Dakota, see Weber v. Tschetter, 1 S. Dak. 205, 46 N. W. 201.

181 Bryan v. Berry, 8 Cal. 130; Cal. Code Civ. Proc., § 939, subd. 3. That an order refusing to modify a judgment is not appealable, see Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093.

182 See Butler v. Niles, 28 How. Pr. 181.

183 Savage v. Smith, 154 Cal. 325, 97 Pac. 821.

184 McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16. See Poierier v. Gravel, 88 Cal. 79, 25 Pac. 962; La Fetra v. Gleason, 101 Cal. 246, 35 Pac. 765.

185 Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Deering v. Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801.

§ 1706. Judicial errors.—If, in acting judicially, the court commits an error, the remedy is by appeal, and not by *mandamus*.[186] For an error in law excepted to, an appeal lies without motion for a new trial.[187] Where certain evidence, which was essential to sustain a party's defense, was erroneously excluded, and thereby evidence on another point likewise essential to his defense was excluded, such error is prejudicial, and ground for reversal on appeal of a judgment rendered against him.[188]

§ 1707. New trial.—An appeal may be taken from an order granting or refusing a new trial;[189] but the motion must have been prosecuted before the trial court.[190] Such an appeal

186 People v. Pratt, 28 Cal. 166; 87 Am. Dec. 110.

187 Rice v. Gashirie, 13 Cal. 53; Cal. Code Civ. Proc., § 956.

188 Jolley v. Foltz, 34 Cal. 321.

189 Cal. Code Civ. Proc., § 939; N. Y. Code Civ. Proc., § 1347; Ketchum v. Crippen, 31 Cal. 365; Adams v. Bush (No. 1), 2 Abb. Pr. (N. S.) 104; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Harper v. Hildreth, 99 Cal. 265, 33 Pac. 1103; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Estate of Doyle, 68 Cal. 132, 8 Pac. 691; In re Bauquier, 88 Cal. 302, 26 Pac. 178, 532; In re Spencer, 96 Cal. 448, 31 Pac. 453; Sandmeyer v. Dakota etc. Ins. Co., 2 S. Dak. 346, 50 N. W. 353; Schultz v. Keeler, 2 Idaho, 333, 13 Pac. 481. Otherwise in Oregon. Beekman v. Hamlin, 23 Or. 313, 31 Pac. 707; McQuaid v. Portland etc. R. R. Co., 19 Or. 535, 25 Pac. 26. As to review on appeal of new trial order, see In re Westerfield, 96 Cal. 113, 30 Pac. 1104; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Wheeler v. Bolton, 92 Cal. 159, 28 Pac. 558; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481, 18 L. R. A. 124; Gage v. Downey, 94 Cal. 241; Hegard v. Insurance Co., 72 Cal. 535; Orth v. Zions etc. Mercantile Inst., 5 Utah, 419, 16 Pac. 590; Mattock v. Gouchnour, 13 Mont. 300, 34 Pac. 36; Grigsby v. Schwarz, 82 Cal. 278, 22 Pac. 1041; Fox v. Southern Pacific Co., 95 Cal. 234, 30 Pac. 384; Carron v. Wood, 10 Mont. 500, 26 Pac. 388. As to time to appeal, see Schroder v. Schmidt, 71 Cal. 399, 12 Pac. 302; Brough v. Mighell, 6 Utah, 317, 23 Pac. 673; Nelson v. Donovan, 14 Mont. 78, 35 Pac. 227. As to notice of appeal, see Watson v. Sutro, 77 Cal. 609, 20 Pac. 88; Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; Moore v. Long Beach Development Co., 87 Cal. 483, 22 Am. St. Rep. 265, 26 Pac. 92; Gumpel v. Castagnetto, 97 Cal. 15, 31 Pac. 898. As to papers on appeal, see Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124; McLeod v. Dickerson, 11 Mont. 438, 28 Pac. 551. Order affirmed, as to when, see Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; Douglass v. McFarland, 92 Cal. 656, 28 Pac. 687. As to dismissal of appeal, see Scott v. Glenn, 98 Cal. 168, 32 Pac. 983; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Forni v. Yoell, 95 Cal. 442, 30 Pac. 578; People v. Burns, 78 Cal. 645, 21 Pac. 540.. As to stay of execution, see Kirman v. Hunnewill, 91 Cal. 157, 27 Pac. 587. As to questions of law, see Santa Marina v. Connolly, 79 Cal. 517, 21 Pac. 1093.

190 Cal. Code Civ. Proc., § 963;

brings up the whole record.[191] Without such an appeal the supreme court cannot review the evidence to determine whether the verdict or findings are sustained by it.[192] But no appeal lies from the refusal of the trial court to settle a statement on motion for a new trial.[193]

§ 1708. **Receiver.**—An *ex parte* order appointing a receiver is appealable,[194] but not so when such appointment has effect only to the time when hearing can be had on the question of appointment of a receiver.[195] An order settling a receiver's account in a pending action is a final determination of the rights of the parties, and appeal lies therefrom at any time within six months.[196] An appeal lies from an order refusing to appoint a receiver in proceedings supplementary to execution against a judgment debtor.[197] An order setting aside or opening the biddings on a judicial sale, regular in itself, is not appealable;[198] or an order denying a stay of trial in one cause until determination of another;[199] or refusal to adjourn the hearing before a referee.[200] Under the laws of Washington, an appeal may be taken from any order appointing or removing, or refusing to appoint or remove, a receiver.[201] An order appointing a receiver is not subject to appeal in Montana.[202] And it is held in Washington that an appeal

Mahoney v. Wilson, 15 Cal. 42; Frank v. Doane, 15 Cal. 303; Green v. Doane, 15 Cal. 302.

191 Hanscom v. Tower, 17 Cal. 518; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135.

192 Green v. Butler, 26 Cal. 595; Clark v. Gridley, 49 Cal. 105.

193 Machado v. Kinney, 135 Cal. 354, 67 Pac. 331.

194 Rumney v. Donovan, 28 Mont. 69, 72 Pac. 305.

195 State v. Superior Court, 34 Wash. 123, 74 Pac. 1070.

196 City of Los Angeles v. Los Angeles City Water Co., 134 Cal. 121, 66 Pac. 198.

197 Heroy v. Gibson, 10 Bosw. 591; Bailey v. Lane, 15 Abb. Pr. 373, note.

198 Hazleton v. Wakeman, 3 How. Pr. 357; Wakeman v. Price, 3 N. Y. 334; Buffalo Savings Bank v. Newton, 23 N. Y. 160.

199 James v. Chalmers, 6 N. Y. 209.

200 Carpenter v. Haynes, 1 N. Y. Code Rep. (N. S.) 414.

201 Armstrong v. Ford, 10 Wash. 64, 38 Pac. 866. See Radebaugh v. Tacoma R. R. Co., 8 Wash. 570, 36 Pac. 460. As to extent of review, see Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26; State v. Independent District Court, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392. As to appeal from order denying application for leave to sue receiver, see Meeker v. Sprague, 5 Wash. 242, 31 Pac. 628. From order relative to compensation of receiver, see Thompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Martin v. Martin, 14 Or. 165, 12 Pac. 234. From order directing receiver to pay fund into court, see Coburn v. Ames, 80 Cal. 243, 22 Pac. 174.

202 Stebbins v. Savage, 5 Mont.

will not lie from an order removing one receiver and appointing another in his stead. [203]

§ 1709. Reference.—Granting reference in cases not properly referable is appealable;[204] or for refusing to enter a decree on report of the referee.[205]

§ 1710. Special orders after judgment.—An appeal may be taken from any special order made after final judgment.[206] An appeal from an order made after judgment striking out a cost-bill does not lie where the amount of the costs claimed is less than three hundred dollars and such an appeal must be dismissed for want of jurisdiction.[207] An order denying a motion to amend the minutes of the trial court after judgment is not an appealable order.[208]

An order granting relief from failure to present a proposed bill of exceptions for settlement on time is neither a special order nor a final judgment that is appealable, but may be reviewed on appeal from the order on motion for a new trial.[209] An order denying, in part, a confirmation of a sale in partition is a special order after final judgment;[210] as is also an order striking from the record so much of a judgment as awards recovery from the sureties.[211] An order, made after an unsuccessful appeal, vacating a judgment on grounds of fraud is not reviewable, except on appeal from final judgment.[212] Nor is an order denying a motion to correct a judgment appealable.[213] But an order amend-

253, 5 Pac. 278. See United States v. Church, 5 Utah, 394, 16 Pac. 723.

203 State v. Superior Court, 7 Wash. 74, 34 Pac. 431. That approval of receiver's account is non-appealable order, see Rochat v. Gee, 91 Cal. 355, 27 Pac. 670.

204 Whitaker v. Desfosse, 7 Bosw. 678; Harris v. Mead, 16 Abb. Pr. 257; Dickenson v. Mitchell, 19 Abb. Pr. 286.

205 Ludlum v. Fourth District Court, 9 Cal. 7.

206 Cal. Code Civ. Proc., § 963. See Hayes v. First Judicial District Court, 11 Mont. 225, 38 Pac. 259; Dietrich v. Steam Dredge, 14 Mont. 261, 36 Pac. 81; Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759. As to what papers will be considered on the appeal, see Peltret v. Frank, 66 Cal. 34, 4 Pac. 885; Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624.

207 Perry v. Quackenbush, 105 Cal. 299, 38 Pac. 740. See Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

208 Griess v. State Investment Co., 93 Cal. 411, 28 Pac. 1041.

209 Klatschmidt v. Weber, 136 Cal. 675, 69 Pac. 497.

210 Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847.

211 Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004.

212 Post v. City of Spokane, 75 Wash. 114, 76 Pac. 510.

213 Cullen v. Harris, 27 Utah, 4, 73 Pac. 1048.

ing a judgment already entered is appealable as a special order after final judgment.[214] Appeal will not lie from an order refusing to set aside a final judgment.[215] An order after final judgment, refusing to disallow defendant's costs is reviewable on appeal from the judgment, and not on an independent appeal.[216]

Appeals from orders after judgment are allowed to correct erroneous proceedings subsequent to and founded on a good judgment.[217] In Massachusetts, an appeal lies from a decision of a court of common pleas arresting judgment in a civil action;[218] from an order made by judge at chambers setting aside an execution and perpetually staying the enforcement of the same;[219] from an order refusing the issuance of an execution, on the grounds of a counter-judgment without opposition, to test the right to have the application granted;[220] or from an order refusing to quash an execution;[221] but not from an order that execution issue.[222] An appeal lies from a judgment on a rule of court dismissing an opposition to an order of seizure and sale.[223] The act of the district judge in granting an order of seizure and sale is a judicial act from which an appeal will lie;[224] or from an order denying attachment against a party refusing to be examined in supplementary proceedings.[225] An order denying a motion to dismiss a motion for a new trial may not be appealed from; nor can an exception to the ruling be considered upon an appeal, unless it is made part of the record upon appeal from an order which grants, or which in effect operates as a denial of, the motion for a new trial.[226]

§ 1711. **Striking out.**—An order striking out from the answer matter constituting a good defense is reviewable on appeal from

214 State v. Dist. Court, 32 Mont. 20, 79 Pac. 410.

215 Green v. Thatcher, 31 Colo. 363, 72 Pac. 1078.

216 Spencer v. Mungus, 28 Mont. 357, 72 Pac. 663.

217 Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520.

218 Bemis v. Faxon, 2 Mass. 141.

219 Bond v. Pacheco, 30 Cal. 530.

220 Belts v. Garr, 26 N. Y. 383; Horton v. Miller, 44 Pa. St. 256. See Shuman v. Strauss, 52 N. Y. 404.

221 Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290; Cooley v. Gregory, 16 Wis. 303.

222 Mount v. Mitchell, 31 N. Y. 356; In re Williamson's Estate, 26 Utah, 50, 72 Pac. 2.

223 Heft v. Kelty, 17 La. Ann. 144.

224 Board of Levee Commissioners v. Marks, 16 La. Ann. 112.

225 Holstein v. Rice, 24 How. Pr. 135.

226 Griess v. Investment Co., 93 Cal. 411, 28 Pac. 1041. See Holmes v. McCleary, 63 Cal. 497; McDonald

the final judgment.[227] An order striking a statement on motion for a new trial from the files is an appealable order.[228] But no appeal lies from an order striking out an answer,[229] or from an order or decision striking out a complaint.[230] An order refusing to strike an amended complaint from the files may not be appealable.[231]

§ 1712. Supplemental complaint.—An order allowing a supplemental complaint to be filed may be appealed from.[232] Under the statute of Minnesota, an appeal lies from a decision of referees appointed to assess damages for the occupation of complainant's land,[233] or from a decision of the county commissioners in a controversy about a ferry.[234]

§ 1713. Suspending attorney.—An order by a trial court suspending or removing an attorney is appealable.[235]

§ 1714. Discretion of court.—An order or matter resting in the discretion of the court, or a question of pure practice, does not involve the merits, and is not appealable,[236] as an order granting or refusing a favor.[237] But the refusal to exercise discretion on the ground of want of power is error of law, and a ground of appeal;[238] so a palpable abuse of discretion,[239] or a mistake,[240] or

v. McConkey, 57 Cal. 325; Larkin v. Larkin, 76 Cal. 323, 18 Pac. 396.

227 Rapalee v. Stewart, 27 N. Y. 310.

228 Sutton v. Symons, 100 Cal. 576, 35 Pac. 158.

229 Beach v. Hodgdon, 66 Cal. 187, 5 Pac. 77.

230 Clifford v. Allman, 84 Cal. 528, 24 Pac. 292; Owen v. McCormick, 5 Mont. 255, 5 Pac. 280.

231 Sharp v. Miller, 66 Cal. 98, 4 Pac. 1065. As to review of motion to strike out pleadings, see Sutton v. Stephan, 101 Cal. 545, 36 Pac. 106.

232 Cheesman v. Sturges, 19 Abb. Pr. 293.

233 Paddox v. St. Croix Corporation, 8 Minn. 277; Ames v. Mississippi etc. Co., 8 Minn. 467. As to appeal from order overruling exceptions to report of referee, see Townsend v. Petersen, 12 Colo. 491, 21 Pac. 619.

234 Carothers v. Wheeler, 1 Or. 194.

235 Cal. Code Civ. Proc., § 287, subd. 5.

236 Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326; Dossett v. St. Paul etc. Lumber Co., 28 Wash. 618, 69 Pac. 9; Jorgensen v. Boehmer, 9 Minn. 181; Vincent v. Wellington, 18 Wis. 159; Cushman v. Brundrett, 50 N. Y. 296; White v. Coulter, 59 N. Y. 629.

237 Fort v. Bard, 1 N. Y. 43; Mead v. Mead, 2 E. D. Smith, 223.

238 Murphy v. Stelling, 138 Cal. 641, 72 Pac. 176; Tilton v. Beecher, 59 N. Y. 176, 17 Am. Rep. 337; Equitable L. Ins. Co. v. Stevens, 63 N. Y. 341; Morris v. Wheeler, 45 N. Y. 708; The King v. The Justice etc., 14 East, 395.

239 Plato v. Kelly, 16 Abb. Pr. 188; Fredericks v. Taylor, 52 N. Y. 596, 14 Abb. Pr. (N. S.) 77.

240 Fields v. Moul, 15 Abb. Pr. 6.

an order in statutory proceedings, where limits imposed by the legislature on the exercise of discretion are exceeded.[241]

§ 1715. Discretionary orders—Parties.—An appeal will not lie from the refusal of the court to permit a party to be made co-defendant;[242] or from an order making a new party defendant;[243] or from an order denying a motion for leave to intervene.[244] A motion to renew an action, made with notice to the surviving defendant only, and denied, cannot be appealed from.[245] An order dismissing the petition of an intervener is no ground of appeal for the defendant.[246]

§ 1716. Discretionary orders—Transfer.—An appeal lies from an order refusing to transfer a cause from a state court to a federal court, because of alienage of defendant.[247]

§ 1717. Discretionary orders—Practice.—No appeal lies from an order regulating a mode of proceeding, within the judicial discretion.[248] So of an order or decision as to right to begin or close a case;[249] or an order suspending trial to bring in further evidence;[250] or an order staying proceedings until further direction of the court;[251] or an order restoring the cause to the calendar for trial;[252] or an order of court refusing to set aside a former order.[253] When two orders are made, the latter affirming the former, appeal must be made from the latter.[254] The party cannot fall back and seek to reverse the order by a direct appeal.[255] No appeal lies from an order of court refusing to set aside an interlocutory judgment.[256] An order granting

241 In re Livingston's Petition, 34 N. Y. 555.

242 Cobre Grande Copper Co. v. Greene, 8 Ariz. 98, 68 Pac. 524; Roberts v. Patton, 18 Mo. 485.

243 Beck v. City of San Francisco, 4 Cal. 375. That an order substituting a party plaintiff is not appealable, see Welsh v. Allen, 54 Cal. 211.

244 Wenborn v. Boston, 23 Cal. 321; Scheidt v. Sturgis, 10 Bosw. 606.

245 Union Bank v. Mott, 27 N. Y. 633.

246 McRobbie v. Higginbotham, 11 Colo. 312, 18 Pac. 31.

247 Hopper v. Kalkman, 17 Cal. 517; Brooks v. Calderwood, 19 Cal. 124.

248 McCoun v. New York Cent. etc. R. R. Co., 50 N. Y. 176; Arthur v. Griswold, 60 N. Y. 143.

249 Fry v. Bennett, 28 N. Y. 324.

250 Phelps v. Ward, 10 Bosw. 617.

251 Rhodes v. Craig, 21 Cal. 419.

252 Dimick v. Deringer, 32 Cal. 488.

253 Gates v. Walker, 35 Cal. 289; Hastings v. Cunningham, 35 Cal. 549; Culver v. Hollister, 17 Abb. Pr. 405.

254 Horn v. Volcano Water Co., 18 Cal. 141.

255 Id.

256 Stearns v. Marvin, 3 Cal. 376.

leave to renew a motion,[257] or an order refusing to dismiss a cause for want of prosecution, is not appealable.[258] But the dismissal of an action is final;[259] or an order refusing to substitute assignee *pendente lite* as party;[260] or an order striking the cause from general term calendar;[261] or an order refusing a continuance.[262]

§ 1718. Interlocutory orders.—An order which does not determine the controversy, but leaves it to proceed, is not appealable.[263] An order or judgment which does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, is interlocutory and not final, and is non-appealable.[264] An appeal will not lie from an interlocutory order, except in cases provided by statute;[265] or from an order denying a rehearing of a decree of this nature.[266] A statute authorizing appeal from interlocutory decrees is invalid, as in conflict with the organic act of New Mexico.[267] An appeal does not lie from an order for judgment on a frivolous answer;[268] or from an order striking out scandalous matter;[269] or from an order striking out an answer as sham or irrelevant;[270] or from an order for judgment on partial demurrer;[271] or from an order overruling a demurrer;[272] or from an order sustaining a demurrer.[273] An

257 Smith v. Spaulding, 30 How. Pr. 339.

258 Waldo v. Rice, 18 Wis. 404; Lamphear v. Lamprey, 4 Mass. 107.

259 Tappan v. Bruen, 5 Mass. 193; Wood v. Ross, 11 Mass. 275.

260 Packard v. Wood, 17 Abb. Pr. 318.

261 Cotes v. Smith, 31 How. Pr. 146.

262 Haraszthy v. Horton, 46 Cal. 546.

263 De Harrison v. Perea, 11 N. Mex. 505, 70 Pac. 558; Illius v. New York etc. R. R. Co., 13 N. Y. 597; Kanouse v. Martin, 6 How. Pr. 240; Duane v. Northern R. R. Co., 3 N. Y. 545.

264 Hagerman v. Moore, 2 Colo. App. 83, 29 Pac. 1014; Dusing v. Nelson, 7 Colo. 134, 2 Pac. 922.

265 People v. Thurston, 5 Cal. 517; Juan v. Ingoldsby, 6 Cal. 439; De Barry v. Lambert, 10 Cal. 503; Baker v. Baker, 10 Cal. 527; Harris v. Clark, 4 How. Pr. 78; Cruger v. Douglass, 2 N. Y. 571; Chittenden v. Missionary Society, 8 How. Pr. 327; Swarthout v. Curtis, 4 N. Y. 415.

266 King v. Merchants' Exchange Co., 5 N. Y. 547.

267 Jung v. Myer, 11 N. Mex. 378, 68 Pac. 933.

268 Dunham v. Nicholson, 4 How. Pr. 140. See, also, Wilkin v. Raplee, 52 N. Y. 248.

269 Opdyke v. Marble, 18 Abb. Pr. 375.

270 Briggs v. Bergen, 23 N. Y. 162; Hanover Fire Ins. Co. v. Tomlinson, 58 N. Y. 651; Tabor v. Gardner, 41 N. Y. 232.

271 Paddock v. Springfield etc. Ins. Co., 12 N. Y. 591.

272 Belding v. Washington Cornice Co., 36 Wash. 549, 79 Pac. 37; Bennett v. Nichols, 12 Mich. 22; Ford v. David, 13 How. Pr. 193; Rutherford v. Fisher, 4 Dall. 22, 1 L. Ed. 724; Smith v. McEvoy, 8 Utah 58, 29 Pac. 1030.

273 Rutherford v. Fisher, 4 Dall.

order denying an application in a pending suit to permit another to intervene and become a party to the suit is not such a final order as to be appealable;[274] nor is an order refusing to enter a default;[275] nor is a judgment for costs for defendant sureties, on failure of plaintiff to amend.[276] In Minnesota, under the statute of 1861, an appeal is allowed from any order made upon a demurrer.[277] So in Massachusetts, for the cause that the declaration does not state a legal cause of action.[278] An appeal in a criminal case may be taken from an order allowing a demurrer, though final judgment be not entered.[279] An appeal does not lie from an order entering a default;[280] from an order requiring parties to interplead, when no final judgment is shown of record;[281] from an order refusing to enter a default against a defendant;[282] from an order dismissing an action as to one party, made before judgment;[283] from an order dismissing a cross-complaint on demurrer to the same;[284] from an order made before judgment, staying all proceedings until further order.[285]

§ 1719. **Interlocutory orders—Costs.**—An appeal does not lie from an order correcting an award of costs on *certiorari;*[286] or from an order awarding costs against an executor refusing to refer.[287] In a suit against an officer and his sureties on his bond, a judgment by default against the plaintiff in favor of the sureties for costs, for failure to amend his complaint, is not a final judgment, and is not appealable.[288] Neither does an appeal lie from an order requiring a receiver to give security for costs;[289]

22, 1 L. Ed. 724; McClay v. Hanna, 4 Dall. 130, 1 L. Ed. 782; Miners' Bank v. United States, 5 How. 215, 12 L. Ed. 121; Blakely v. Fisk, Hempst. 11, Fed. Cas. No. 18240; Mason County v. Dunbar, 10 Wash. 163, 38 Pac. 1003; Olympia v. Mann, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150.

274 Cobre Grande Copper Co. v. Greene, 8 Ariz. 98, 68 Pac. 524.

275 Brockway v. W. & T. Smith Co., 17 Colo. App. 96, 66 Pac. 1073.

276 Nolan v. Smith, 137 Cal. 360, 70 Pac. 166.

277 St. Paul Division v. Brown, 9 Minn. 151.

278 Amherst R. R. Co. v. Watson, 4 Gray, 61.

279 People v. Logan, 1 Nev. 110.

280 Ricketson v. Compton, 23 Cal. 650.

281 Wagstaff v. Wagstaff, 67 Kan. 832, 72 Pac. 780.

282 Brockway v. W. & T. Smith Co., 17 Colo. App. 96, 66 Pac. 1073.

283 Dimick v. Deringer, 32 Cal. 492.

284 Daniels v. Lansdale, 38 Cal. 567.

285 Rhodes v. Craig, 21 Cal. 419.

286 People v. Robinson, 25 How. Pr. 345.

287 Niblo v. Binsse, 31 How. Pr. 476.

288 Nolan v. Smith, 137 Cal. 360, 70 Pac. 166.

289 Bolles v. Duff, 17 Abb. Pr. 448.

nor from an order made on a motion to retax costs. The error can be revised only on an appeal from the judgment;[290] or an order allowing costs on a peremptory *mandamus;*[291] or an order made on motion to open a judicial sale on grounds not affecting the regularity of the proceedings;[292] or an order for an extra allowance of costs.[293] An order on a motion to tax a cost-bill, made after the rendition and entry of final judgment, can be reviewed only on a direct appeal therefrom.[294] An order sustaining a demurrer and awarding costs may not show that the rights of the parties are thereby finally determined, and is not appealable.[295] An order allowing certain funds for services of an administrator and his attorney, entered in the form of a judgment of the court, after testimony is heard and findings made, is a final order from which appeal will lie.[296]

§ 1720. **Interlocutory orders—Evidence.**—An appeal does not lie from a decision that a deposition is or is not regularly taken;[297] or from an order refusing to issue a commission to take testimony;[298] or from an order striking out interrogatories attached to a pleading;[299] or from an order overruling a demurrer;[300] or from an order admitting affidavits on motion,[301] or stopping cross-examination, unless in case of manifest abuse or injustice.[302]

§ 1721. **Interlocutory orders—New trial.**—An appeal does not lie from an order denying a motion for new trial on ground of surprise;[303] or refusing to amend an order allowing time to move for a new trial;[304] or striking out or refusing to strike

290 Lasky v. Davis, 33 Cal. 677.

291 People v. Albright, 14 Abb. Pr. 305.

292 Kingsland v. Bartlett, 28 Barb. 480, 8 Abb. Pr. 42.

293 Krekeler v. Ritter, 62 N. Y. 372.

294 Empire Co. v. Bonanza Co., 67 Cal. 406, 7 Pac. 810.

295 Butte & B. Cons. Min. Co. v. Montana Ore Purchasing Co., 27 Mont. 152, 69 Pac. 714.

296 In re Sullivan's Estate, 36 Wash. 217, 78 Pac. 945; In re Currier's Estate, 19 Colo. App. 245, 74 Pac. 340.

297 Hix v. Fisher, 2 Winst. L. 84.

298 People v. Stillman, 7 Cal. 117.

299 Davenport Co. v. City of Davenport, 15 Iowa, 6.

300 Belding v. Washington Cornice Co., 36 Wash. 549, 79 Pac. 37.

301 Childs v. Fox, 18 Abb. Pr. 112.

302 President etc. Great Western Turnpike Co. v. Loomis, 32 N. Y. 127, 88 Am. Dec. 311.

303 Selden v. Delaware etc. Canal Co., 29 N. Y. 634; Bedell v. Chase, 34 N. Y. 386; Shuttleworth v. Winter, 55 N. Y. 624; White v. Harvey, 23 Ind. 55.

304 Pendegast v. Knox, 32 Cal. 73; Quivey v. Gambert, 32 Cal. 304.

out a statement made on motion for a new trial,[305] or from an order denying a motion to certify a statement;[306] or directing such statement to be settled.[307] An order striking out a new trial statement from the files is appealable.[308] While a motion for a new trial is pending, there is no "final order" from which an appeal can be taken.[309] Upon a bill for relief against a judgment at law, a decree granting a new trial on terms, and not dismissing the bill on making the injunction perpetual, is an interlocutory order, and not appealable.[310]

§ 1722. **Interlocutory orders—Receiver.**—An appeal does not lie from an order directing a receiver to distribute the funds in his hands unless it is the final result of the proceeding;[311] or from an order authorizing a receiver of a mining company to purchase and operate a cyanide tailings plant, and pay for same out of funds in his hands;[312] or from an order as to appointment or substitution of receiver,[313] or refusal to allow receiver to commence action.[314]

§ 1723. **Interlocutory orders—Reference.**—An appeal does not lie from an order granting a reference in referable causes;[315] or from the findings of a referee in a divorce case;[316] or as to decisions of a referee in relation to alimony;[317] or directly from an order overruling exceptions to a referee's report;[318] or from an order vacating an order of reference.[319]

§ 1724. **Interlocutory orders—Vacating judgment.**—An appeal lies directly from a judgment, but not from an order refusing to

305 Ketchum v. Crippen, 31 Cal. 365; Genella v. Relyea, 32 Cal. 159; Pendegast v. Knox, 32 Cal. 73; Quivey v. Gambert, 32 Cal. 304. But see Macy v. Davila, 48 Cal. 646; Calderwood v. Peyser, 42 Cal. 110; Clark v. Crane, 57 Cal. 633.

306 Genella v. Relyea, 32 Cal. 159.

307 Leffingwell v. Griffing, 29 Cal. 192.

308 Sutton v. Symons, 100 Cal. 576, 35 Pac. 158.

309 Mitchell v. Downing, 23 Or. 448, 32 Pac. 394.

310 Lea v. Kelly, 15 Pet. 213, 10 L. Ed. 715.

311 Adams v. Woods, 21 Cal. 165.

312 Free Gold Min. Co. v. Spiers, 135 Cal. 130, 67 Pac. 61.

313 Siney v. New York Cons. Stage Co., 28 How. Pr. 481; Janeway v. Green, 16 Abb. Pr. 215, note; Stebbins v. Savage, 5 Mont. 253, 5 Pac. 278.

314 Petition of Reeve, 34 N. Y. 359.

315 Welsh v. Darragh, 52 N. Y. 590; Kain v. Delano, 11 Abb. Pr. (N. S.) 29.

316 Baker v. Baker, 10 Cal. 527.

317 Forrest v. Forrest, 25 N. Y. 501.

318 Peck v. Courtis, 31 Cal. 207.

319 Hastings v. Cunningham, 35 Cal. 553.

set it aside[320] on the ground of irregularity,[321] or imposing conditions upon which a judgment is vacated;[322] or from an order vacating a judgment which dismisses an appeal from the probate court,[323] or dismissing a petition for attorney's fees.[324] But an order vacating a judgment by confession, on account of a defect in the statement, was held appealable,[325] or refusing to set aside an execution merely voidable.[326] An appeal from a judgment regular on its face is not the proper remedy for a party seeking to set it aside for fraud.[327]

§ 1725. Void order.—It is not necessary to appeal from a void order which can have no operation or effect.[328] An appeal lies from a portion of an order.[329]

§ 1726. Amount or value in controversy.—In all cases where the supreme court has appellate jurisdiction of the matter brought in the lower court, jurisdiction is not affected by the amount involved.[330] If the judge of the lower court certifies that the case is one of the excepted cases under one hundred dollars, the supreme court will consider the case.[331] Actions at law for a money judgment below a certain amount cannot be heard on appeal;[332]

320 Peralta v. Castro, 15 Cal. 511; Fisher v. Hepburn, 48 N. Y. 41; White v. Coulter, 59 N. Y. 629; Maples v. Geller, 1 Nev. 233; Fort v. Bard, 1 N. Y. 43; Fasset v. Tallmadge, 15 Abb. Pr. 205. That order setting aside a judgment is not a final order from which an appeal will lie, see Greene v. Williams, 6 Wash. 260, 33 Pac. 588; Lilienthal v. Wright, 1 Wash. 1, 23 Pac. 801; Gower v. Gower, 1 Wash. 16, 24 Pac. 29. As to review of erroneous ruling in rendering judgment on pleadings, see Weeks v. Garibaldi South Gold Min. Co., 73 Cal. 599, 15 Pac. 302.

321 Jones v. Derby, 16 N. Y. 242; Sherman v. Felt, 2 N. Y. 186; Ingersoll v. Bostwick, 22 N. Y. 425; Lake Ontario etc. R. R. Co. v. Marvin, 18 N. Y. 585; McCormick v. Pickering, 4 N. Y. 276; Catlin v. Billings, 16 N. Y. 622; Pendleton v. Weed, 17 N. Y. 72.

322 Board of Commissioners v. Blackington, 11 N. Mex. 360, 68 Pac. 938.

323 McMaster v. People's Bank, 18 Okla. 326, 73 Pac. 946.

324 Nash v. Wakefield, 30 Wash. 556, 71 Pac. 35.

325 Belknap v. Waters, 11 N. Y. 477.

326 Bank of Genesee v. Spencer, 18 N. Y. 150.

327 Lang Syne Min. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337, 18 Pac. 358.

328 Killip v. Empire Mill Co., 2 Nev. 34; Kamp v. Kamp, 59 N. Y. 212.

329 In re Davis' Estate, 11 Mont. 1, 27 Pac. 342.

330 Sierra Water etc. Co. v. Wolff, 144 Cal. 430, 77 Pac. 1038.

331 Graves v. Bond, 70 Kan. 464, 78 Pac. 851; Crouse v. Brown, 65 Kan. 858, 69 Pac. 165.

332 Barto v. Seattle etc. Ry. Co., 28 Wash. 179, 68 Pac. 442.

but in an equitable proceeding an appeal lies irrespective of the amount in controversy, as in a case to enforce liability of stockholders of an insolvent bank,[333] or to enjoin sale of real property under a tax judgment,[334] or a writ of mandate requiring a city attorney to approve a cost-bill.[335]

Where appellate jurisdiction depends upon the demand, it is the amount demanded in the complaint which controls, and not the amount recovered.[336] Thus where plaintiff sues for five hundred dollars and recovers one hundred, the amount originally in controversy is over two hundred, and defendant can appeal.[337] The supreme court has no jurisdiction of an appeal by a garnishee from a judgment against him where the amount claimed to be due from him to the principal debtor is less than two hundred dollars, no matter how large the debt of the principal debtor is.[338] If the amount in controversy is the loss of interest sustained by the correction of a journal entry, which loss, deducted from the judgment, is less than one hundred dollars, there is no appeal.[339]

In Washington, the amount in controversy, for the purpose of determining appellate jurisdiction is the value of the personal property, as found by the trial court, and not the value as alleged in the complaint, and damages alleged for the detention thereof cannot be added to the value of the property.[340] As to the claimant who has a lien on personalty of the value of three hundred dollars, and his lien is for fifty-one dollars, the amount in controversy is less than one hundred dollars.[341] Where there is nothing in the record to indicate that defendant in replevin has been deprived of his property, and the judgment of the trial court for plaintiff indicating that plaintiff is not in possession, the amount involved in the appeal is the value of the property, though defendant prays for judgment for his costs only.[342] Where the right to appropriate water in a stream is less than one hun-

333 Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

334 Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105.

335 City of Spokane v. Smith, 37 Wash. 583, 79 Pac. 1125.

336 Dashiell v. Slingerland, 60 Cal. 653.

337 Kirby v. Rainier Grand Hotel Co., 28 Wash. 705, 69 Pac. 378.

338 Schreiner v. Emel, 26 Wash. 555, 67 Pac. 228.

339 Edinburgh Lombard Ind. Co. v. Cooper, 68 Kan. 517, 75 Pac. 488.

340 Graves v. Thompson, 35 Wash. 282, 77 Pac. 384; Schreiner v. Emel, 26 Wash. 555, 67 Pac. 228.

341 Blank v. Powell, 68 Kan. 556, 75 Pac. 486.

342 Gila Valley etc. Ry. Co. v. Gila County, 8 Ariz. 292, 71 Pac. 913.

dred dollars, and no decree of the lower court shows it to be a question affecting real estate, there is no appeal.[343]

§ 1727. Reduction of the amount in controversy.—If in an action to recover over thirty-four thousand dollars, judgment is entered dismissing the action, and against plaintiff's attorney for eighteen dollars and seventy-five cents costs, an appeal lies by the attorney from the judgment, though the part against him is less than three hundred dollars, since that was a part of the general judgment determining the entire controversy.[344] A judgment reducing the amount of another judgment a few hundred dollars, and ordering that as to the sum of eighteen hundred dollars defendant was not entitled to a lien granted by such former judgment, is not reviewable on error to the supreme court, the sum involved being below the jurisdictional amount.[345] If several actions of the same character are consolidated and tried through to final judgment without objection, it is too late to object on appeal, and the jurisdiction of the supreme court will be determined by the whole amount in controversy.[346]

If suit is brought for three hundred dollars, and defendant tenders and pays into court two hundred and seventy dollars, the amount in controversy is then less than two hundred dollars, and no appeal lies.[347] Where certain items of damage are by plaintiff withdrawn from the consideration of the jury, thus reducing the amount in controversy to less than two hundred dollars, the supreme court has no appellate jurisdiction.[348] But if the excess is striken out, on motion of defendant, by an order of the court, then, since plaintiff, though he made no objection to the entry, could appeal and have the ruling reviewed, defendant also may appeal.[349]

§ 1728. Appealable orders—Miscellaneous.—In addition to the instances of appealable orders heretofore given, are the following: An order vacating an order which vacated a former order

343 Grant v. Robb, 64 Kan. 886, 67 Pac. 852.

344 People v. Madden, 134 Cal. 611, 66 Pac. 874.

345 Splain v. Cripple Creek Min. etc. Co., 31 Colo. 192, 72 Pac. 1060.

346 Skinner v. Board of Commissioners, 63 Kan. 557, 66 Pac. 635.

347 Stewart v. Hanna, 35 Wash. 148, 76 Pac. 688.

348 Dodge v. Corliss, 28 Wash. 474, 68 Pac. 869.

349 Taylor v. Spokane Falls & Northern Ry., 32 Wash. 450, 73 Pac. 499.

setting aside a sheriff's sale under foreclosure judgment;[350] an order for the payment of counsel fees and alimony;[351] an order changing venue,[352] or denying change of venue;[353] an order for distribution of funds held by assignee,[354] or an order settling the final account of an assignee in insolvency;[355] an order for a distribution of funds collected by the receiver in a certain action;[356] an order sustaining objections to the final account of an administrator;[357] an order granting or refusing an adjudication in insolvency;[358] an order denying petition to vacate an order appointing administrator;[359] an order refusing to vacate or modify an order for writ of possession;[360] an order of a trial court refusing to settle a bill of exceptions;[361] an order granting a writ of assistance;[362] an order authorizing an executor to mortgage lands of the estate;[363] an order appointing a guardian of a minor,[364] or an order appointing a guardian of the person and estate of an incompetent person;[365] an order directing a guardian to pay over funds to his ward;[366] an order denying a motion to set aside an order for an examination of a judgment debtor upon supplementary proceedings;[367] an order refusing a writ of mandate;[368]

350 Bailey v. Scott, 1 S. Dak. 337, 47 N. W. 286.

351 In re Finkelstein, 13 Mont. 425, 34 Pac. 847; State v. Second Judicial District Ct., 14 Mont. 396, 40 Pac. 66; Langan v. Langan, 86 Cal. 132, 24 Pac. 852; Sharon v. Sharon, 67 Cal. 185, 7 Pac. 456, 635, 8 Pac. 709. Contra, Wyatt v. Wyatt, 2 Idaho, 236, 10 Pac. 228.

352 Broder v. Conklin, 98 Cal. 360, 33 Pac. 211; Fitzpatrick v. Fitch, 83 Cal. 490, 23 Pac. 531. Contra, State v. Shaw, 21 Nev. 222, 29 Pac. 321; Bogle v. Puget Sound Co-operative Colony, 3 Wash. 138, 28 Pac. 376.

353 In re Davis' Estate, 11 Mont. 1, 27 Pac. 342; Bookwalter v. Conrad, 14 Mont. 62, 35 Pac. 226; White v. Chicago etc. R. R. Co., 5 Dak. 508, 41 N. W. 730.

354 In re Frasch, 5 Wash. St. 344, 31 Pac. 755; 32 Pac. 771.

355 In re Tanner, 70 Cal. 22, 11 Pac. 326.

356 State v. Superior Ct., 8 Wash. 696, 29 Pac. 202.

357 In re Dewar's Estate, 10 Mont. 422, 25 Pac. 1025.

358 Widber v. Superior Court, 94 Cal. 430, 29 Pac. 870.

359 In re Davis' Estate, 11 Mont. 196, 28 Pac. 645.

360 Green v. Hebbard, 95 Cal. 39, 30 Pac. 202.

361 Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332.

362 Davis v. Donner, 82 Cal. 35, 22 Pac. 879.

363 In re McConnell, 74 Cal. 217, 15 Pac. 746.

364 In re Get Young, 90 Cal. 77, 27 Pac. 158.

365 In re Kane's Estate, 12 Mont. 197, 29 Pac. 424.

366 In re Guardianship of Hill's Heirs, 7 Wash. 421, 35 Pac. 131.

367 Barber v. Briscoe, 9 Mont. 341, 23 Pac. 726. As to non-appealable order in supplementary proceedings, see Rule v. Gumeer, 12 Colo. 591, 21 Pac. 905.

368 People v. Thompson, 66 Cal. 398, 5 Pac. 686.

an order overruling a motion to quash an execution;[369] an order of confirmation of a sheriff's sale on execution.[370] An order made at chambers, refusing to stay execution upon a judgment entered, is a "special order made after final judgment," and is appealable.[371] An order setting aside a decree settling the final account of an executor, though not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account.[372]

§ 1729. Non-appealable orders—Miscellaneous.—Among instances of non-appealable orders under various statutes are the following: An order directing an involuntary insolvent to verify his schedule and inventory;[373] an order for suit in the name of an administratrix;[374] an order appointing a special administrator;[375] an order refusing to remove an administrator;[376] an order refusing to vacate an order denying a petition of an executor for extra compensation;[377] an order denying a motion to vacate an order setting aside a homestead from the estate of a decedent;[378] an order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant;[379] an order setting aside an order settling an account of the assignee of an insolvent debtor;[380] an order refusing to set aside an order distributing the estate of a decedent, and settling the final account of the executor;[381] an order striking out an amended complaint;[382] an order refusing an application for judgment upon the findings of a jury;[383] an order granting a motion for judgment on the pleadings;[384] an order refusing to suspend or post-

369 Orr v. Haskell, 2 Mont. 350. See Granite Mountain Min. Co. v. Weinstein, 7 Mont. 347, 17 Pac. 108.

370 Dell v. Estes, 10 Or. 359.

371 Clarke v. Gonu, 2 Mont. 538.

372 In re Cahalan, 70 Cal. 604, 12 Pac. 427. See In re Rose, 80 Cal. 166, 22 Pac. 86.

373 In re Abbott, 74 Cal. 381, 16 Pac. 21.

374 In re Ohm, 82 Cal. 160, 22 Pac. 927.

375 In re Carpenter, 73 Cal. 202, 14 Pac. 677.

376 In re Estate of Moore, 68 Cal. 394, 9 Pac. 315.

377 In re Walkerly, 94 Cal. 352, 29 Pac. 719.

378 In re Cahill's Estate, 142 Cal. 628, 76 Pac. 383.

379 State v. District Court, 28 Mont. 445, 72 Pac. 867.

380 Etchebarne v. Roeding, 89 Cal. 517, 26 Pac. 1079.

381 Lutz v. Christy, 67 Cal. 457, 8 Pac. 39.

382 Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730.

383 Persons v. Simons, 1 N. Dak. 243, 46 N. W. 969.

384 Nelson v. Donovan, 14 Mont. 78, 35 Pac. 227; Holton v. Noble, 83 Cal. 7, 23 Pac. 58.

pone a decree of final distribution;[385] an order denying a motion for a new trial (in Oregon);[386] an order upon a petition for the removal of an assignee of an insolvent;[387] an order appointing an assignee in place of one appointed by the assignor;[388] an order overruling a motion to tax or retax costs;[389] an order of arrest in a civil action;[390] an order setting aside an award of arbitrators;[391] an order restraining the foreclosure of a chattel mortgage by advertisement;[392] an order refusing an order enjoining foreclosure proceedings;[393] an interlocutory order or decree, dividing real estate and granting a mandatory injunction, made at chambers and in vacation;[394] an order refusing to modify a judgment;[395] an order vacating an order reinstating a case;[396] and no appeal will lie from an order dismissing an appeal from a justice's court.[397]

§ 1730. **Time in which to appeal.**—An appeal may be taken—1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.[398] The six months commences to run from the time the judgment is rendered by the court, and not from the time it is entered in the judgment-book by the clerk;[399] from the

385 Estate of Burdick, 112 Cal. 387, 44 Pac. 734.

386 First Nat. Bank v. McCullough (Or.), 93 Pac. 366.

387 In re Goldsmith, 12 Or. 414, 7 Pac. 97, 9 Pac. 565. See, also, Mitchell v. Powers, 16 Or. 491, 19 Pac. 647.

388 State v. Parker, 6 Wash. 411, 34 Pac. 149.

389 Rader v. Nottingham, 2 Mont. 157; First Nat. Bank v. Neill, 13 Mont. 380, 34 Pac. 180.

390 Cline v. Harmon, 2 Wash. 155, 26 Pac. 191, 269.

391 Tacoma Ry. etc. Co. v. Cummings, 5 Wash. 206, 31 Pac. 747; 33 Pac. 507.

392 Bostwick v. Knight, 5 Dak. 305, 40 N. W. 344.

393 Commercial Nat. Bank v. Smith, 1 S. Dak. 28, 44 N. W. 1024.

394 Hadley v. Ulrich, 1 Okla. 380, 33 Pac. 705.

395 Swain v. Burnette, 89 Cal. 564, 26 Pac. 1093.

396 Wheeler v. Garrett, 13 Colo. 140, 21 Pac. 1021.

397 In re Weber, 4 N. Dak. 119, 59 N. W. 523, 28 L. R. A. 621.

398 Cal. Code Civ. Proc., § 939; Waggenheim v. Hook, 35 Cal. 216; Gray v. Palmer, 28 Cal. 416; Hallock v. Jaudin, 34 Cal. 167; Bates v. Gage, 49 Cal. 126; Brooks v. San Francisco Ry. Co., 110 Cal. 173, 42 Pac. 570; Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225; Secord v. Quigley, 106 Cal. 149, 39 Pac. 623; Mogk v. Peterson, 75 Cal. 496, 17 Pac. 446.

399 Gray v. Palmer, 28 Cal. 416; Peck v. Courtis, 31 Cal. 207; Genella

time it is announced by the court and entered in the minutes.[400] The right of appeal depends upon the rendition, not the entry, of judgment.[401] The modification of a judgment made as the result of a motion for new trial is in effect the rendition of a new judgment, and a party thereto may appeal at any time within one year thereafter from the judgment.[402] The pendency of an appeal from an order denying a motion for new trial does not, however, prolong the time for appealing from the judgment.[403] But an appeal is premature, and dismissible where notice thereof is given before entry of the judgment appealed from;[404] and where judgment dismissing a petition for specific performance against an estate is amended several months after its rendition, the amended judgment is appealable at any time within sixty days after the amendment.[405] Where notice of the judgment is required, the time for appeal begins to run from the service of the notice, as the same is established of record.[406] The supreme court cannot enlarge the time fixed by statute.[407] In a New York case [407a] it is decided that that power cannot be exercised directly or indirectly, either by amendment or otherwise, and that a stay of proceedings does not extend time for appeal.[408] The period fixed by the statute is an express and peremptory limitation of time within which the appeal must be taken, and is not a flexible rule to be varied by extrinsic circumstances.[409] A suit is suspended during the period between the death of the plaintiff and the order granting a continuance, and this period is not to be deemed any part of the time limited for taking an appeal.[410] The limitation as to time of appeal cannot be waived by parties to

v. Relyea, 32 Cal. 159; Hall v. Beggs, 17 La. Ann. 238.

400 Wetherbee v. Dunn, 36 Cal. 249; Webster v. Cook, 38 Cal. 424; McCourtney v. Fortune, 42 Cal. 387.

401 California St. Pel. Co. v. Patterson, 1 Nev. 151.

402 Mann v. Haley, 45 Cal. 64.

403 Bornheimer v. Baldwin, 42 Cal. 27.

404 Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

405 In re Potter's Estate, 141 Cal. 350, 74 Pac. 986.

406 Otis Bros. v. Nash, 26 Wash. 39, 66 Pac. 111.

407 See Cal. Code Civ. Proc., § 1054; Roush v. Van Hagen, 17 Cal. 122; Bay v. Van Rensselaer, 1 Paige, 423; Jackson v. Wiseburn, 5 Wend. 136; Dooling v. Moore, 20 Cal. 142; Gimmy v. Doane, 22 Cal. 635; Gray v. Palmer, 28 Cal. 416; Peck v. Courtis, 31 Cal. 207; Genella v. Relyea, 32 Cal. 159; Wait v. Van Allen, 22 N. Y. 319.

407a Humphrey v. Chamberlain, 11 N. Y. 274.

408 Gallt v. Finch, 24 How. Pr. 193; Morris v. Morange, 26 How. Pr. 247; Salls v. Butler, 27 How. Pr. 133.

409 Henry v. Merguire, 111 Cal. 1, 43 Pac. 387.

410 Dick v. Kendall, 6 Or. 166; McBride v. Northern Pacific R. R. Co., 19 Or. 64, 23 Pac. 814.

a suit.[411] The court has no power to extend the time or to cure any defect in taking an appeal.[412] It appears that in New York notice of the order should in all cases be given before the time for appeal commences to run, and that on appeal from judgment, the time runs from the filing of the judgment-roll.[413] Time for appeal runs from the date of entry of a probate order.[414] Such notice cannot be given by anticipation, nor till judgment has been perfected by filing the judgment-roll, or by entry or filing of the order in a special proceeding or after judgment rendered.[415]

An appeal may be taken—2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment.[416] Under the Colorado practice, the appeal must be prayed for within five days from rendition of the judgment.[417] So from a judgment of a trial court, rendered on appeal from a justice's court,[418] in cases of law. But it may be taken on the same day that judgment is entered.[419] An appeal perfected on the same day of the filing of the judgment-roll, but before the hour when the roll was filed, is nevertheless regular. The law does not regard fractions of a day, except to prevent injustice.[420] But where any steps have been taken in good faith, the court has power under the statute to allow an amendment *nunc pro tunc* to supply the defect.[421] After appealing from a judgment alone, a party may appeal from an order refusing a

411 Cogswell v. Hogan, 1 Wash. 4, 23 Pac. 835.

412 Moe v. Harger, 10 Idaho, 302, 77 Pac. 645; Zinkeisen v. Lewis, 71 Kan. 837, 80 Pac. 44, 83 Pac. 28; In re Keithley's Estate, 134 Cal. 9, 66 Pac. 5; Hatton v. Hatton, 136 Cal. 353, 68 Pac. 1016; Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344; Thomas v. Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 Pac. 665; Warren v. McGowan, 144 Cal. xvii, 77 Pac. 909; Van Buskirk v. Balch, 19 Colo. App. 292, 74 Pac. 792; McCrea v. McGrew, 9 Idaho, 382, 75 Pac. 67; Cartier v. Buck, 9 Idaho, 571, 75 Pac. 612; Charles Schatzlein Paint Co. v. Passmore, 26 Mont. 500, 68 Pac. 1113; Candler v. Washoe etc. Co., 28 Nev. 151, 80 Pac. 751; Hight v. Batley, 32 Wash. 165, 98 Am. St. Rep. 851, 72 Pac. 1034; Dean v. Oregon R. & N. Co., 38 Wash. 565, 80 Pac. 842.

413 N. Y. Code Civ. Proc., 1877, § 1325; Bonanza Lead Min. Co. v. Huff, 66 Kan. 786, 71 Pac. 849; Moe v. Harger, 10 Idaho, 302, 77 Pac. 645.

414 In re Turner's Estate, 139 Cal. 85, 72 Pac. 718.

415 Fry v. Bennett, 16 How. Pr. 385.

416 Cal. Code Civ. Proc., § 939.

417 Sindlinger v. Jewell, 1 Colo. App. 340, 29 Pac. 18; Colorado etc. Live Stock Co. v. Godding, 20 Colo. 71, 36 Pac. 884.

418 Dooling v. Moore, 20 Cal. 141.

419 Blydenburg v. Cotheal, 5 How. Pr. 200; Jones v. Porter, 6 How. Pr. 286.

420 Clute v. Clute, 3 Denio, 263; Blydenburg v. Cotheal, 4 N. Y. 418.

421 Fry v. Bennett, 7 Abb. Pr. 352; Haase v. New York Cent. R. R. Co,. 14 How. Pr. 430; Sherman v. Wells, 14 How. Pr. 522.

new trial within the statutory time.[422] But if an appeal be taken in the same notice from both the final judgment and the order refusing a new trial, after sixty days from the entry of the order, the appeal from the order will be dismissed.[423] A party neglected to appeal from an order vacating a judgment in his favor, but nearly a year after it was made, moved to set it aside, and appealed from the order denying that motion. It was held that the appeal would not lie, as it would be a palpable evasion of the statute limiting the time for appeals from orders.[424] A motion to set aside a judgment for irregularity does not suspend the time for appealing.[425]

An appeal may be taken—3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order appointing a receiver; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; from an interlocutory judgment, order, or decree hereafter made or entered in any action for divorce or to redeem real or personal property from a mortgage thereof or lien thereon, determining such right to redeem and ordering an accounting; from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property in the cases mentioned in section seven hundred and sixty-three of the code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk.[426] So for refusing a new trial.[427] So, also, for refusing to vacate an award on certain grounds specified in the motion,[428] after the motion is made and entered in the minutes of the court.[429]

422 Marziou v. Pioche, 8 Cal. 522; Carpentier v. Williamson, 25 Cal. 154. That appeal from order refusing a new trial may be taken before the judgment is entered, see Schroeder v. Schmidt, 71 Cal. 399, 12 Pac. 302.

423 Lower v. Knox, 10 Cal. 480.

424 Von Steenwyck v. Miller, 18 Wis. 320.

425 Renouil v. Harris, 2 Sandf. 641, 2 N. Y. Code Rep. 71.

426 Cal. Code Civ. Proc., § 939, subd. 3, as amended 1907; Stats. 1907, p. 61.

427 Brown v. Tolles, 7 Cal. 398; Towdy v. Ellis, 22 Cal. 651; Waggenheim v. Hook, 35 Cal. 216.

428 Fairchild v. Daten, 38 Cal. 286.

429 Peck v. Vandenberg, 30 Cal. 11; Hihn v. Peck, 30 Cal. 280; Peck v. Courtis, 31 Cal. 207.

§ 1731. The same—Continued.—The failure to take an appeal in time goes to the jurisdiction.[430] If not taken within the time prescribed by statute it will be dismissed,[431] unless a reasonable excuse is shown for the failure.[432] An appeal taken prematurely is abortive;[433] and an appeal from a judgment prior to its entry is held to be premature.[434] The running of the time is not postponed to the time the judgment-roll is actually made up;[435] but it may be calculated from the time of entry of a formal judgment, prepared by counsel, instead of from the clerk's entry.[436] The rights of parties in respect to an appeal are determined by the date of the actual entry of the judgment, and they cannot be affected by the entry of the judgment *nunc pro tunc* as of a prior date.[437] An appeal from a judgment or order in probate proceedings, if not taken within sixty days after the entry of such judgment or order is not taken in time, and will be dismissed.[438] So of appeals from orders generally.[439] An appeal from an interlocutory decree in partition will be dismissed if not taken within sixty days.[440] An appeal from an order granting

430 Estate of Fisher, 75 Cal. 523, 17 Pac. 640.

431 Harvey v. Wait, 10 Or. 117; Griswold v. Ryan, 2 Mont. 47; Borderre v. Den, 106 Cal. 594, 39 Pac. 946; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Gruell v. Spooner, 71 Cal. 493, 12 Pac. 511.

432 Murphy v. Ross, 2 Wash. 327, 26 Pac. 222.

433 Home for Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119.

434 Id.; Onderdonk v. San Francisco, 75 Cal. 534, 17 Pac. 678; Kimple v. Conway, 69 Cal. 71, 10 Pac. 189. See, also, Sweet v. Merki, 27 Ill. App. 245; Lodge v. Twell, 135 U. S. 232, 34 L. Ed. 153, 10 Sup. Ct. 745; Gramm v. Fisher, 3 Wyo. 595, 29 Pac. 377.

435 Dore v. Klumpke, 140 Cal. 356, 73 Pac. 1064; Bryan v. Bryan, 137 Cal. xix. 70 Pac. 304; Robson v. Colson, 9 Idaho, 215, 72 Pac. 951; Corum v. Hubbard, 69 Kan. 608, 77 Pac. 530; Warren v. Humble, 26 Mont. 495, 68 Pac. 851; Wadhams v. Allen, 45 Or. 485, 78 Pac. 362; Henderson v. Barnes, 27 Utah, 348, 75 Pac. 759.

436 Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287.

437 Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. 384. See Burbank v. Rivers, 20 Nev. 159, 18 Pac. 753. Compare Coward v. Clanton, 79 Cal. 23, 21 Pac. 359.

438 Estate of Heidt, 98 Cal. 553, 33 Pac. 549. Estate of Wiard, 83 Cal. 619, 24 Pac. 45; Estate of Fisher, 75 Cal. 523, 17 Pac. 640; Estate of Crowey, 71 Cal. 300, 12 Pac. 230; Estate of Backus, 95 Cal. 671, 30 Pac. 796; Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104; In re Grider, 81 Cal. 571, 22 Pac. 908. Compare Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479.

439 See Illinois etc. Bank v. Pacific Ry. Co., 99 Cal. 407, 33 Pac. 1132; Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95; Symons v. Bunnell, 101 Cal. 223, 35 Pac. 770; Turner v. Reynolds, 81 Cal. 214, 22 Pac. 546; Barham v. Hostetter, 67 Cal. 272, 7 Pac. 689; Henshaw v. Palmer, 59 Cal. 314; Weinrich v. Porteus, 12 Nev. 102.

440 Watson v. Sutro, 77 Cal. 609, 20 Pac. 88.

a new trial operates to suspend the functions of the order, and leaves the judgment subsisting, for the purposes of an appeal therefrom, pending the order. And the time between the making of the order and the reversal thereof upon appeal cannot be excluded from the computation of time within which an appeal must be taken from the judgment.[441]

§ 1732. **Amended judgment.**—Where a judgment is amended, an appeal therefrom within six months from the date of amendment, even though more than six months from the entry of judgment, is in time. The time for appeal runs from the date of the amendment.[442]

§ 1733. **Right of appeal.**—The fact that a decree sought to be appealed from has been executed does not deprive the party of his right of appeal.[443] Notice of entry of judgment, served before costs are finally adjusted, does not have the effect to limit the right of appeal.[444] The right of appeal must be governed by the laws in force at the time the appeal is taken.[445] The fact that parties to an action were citizens of different states does not authorize an appeal to the supreme court of the United States after decision by the supreme court of the state.[446] Residence out of the state for several years is no ground for denying the right to appeal.[447] Counsel opposing a motion to dismiss an action for want of prosecution, by stating that sooner than comply with the order to amend previously made, they would allow the complaint to be dismissed, and present the case on appeal, do not thereby waive the right to appeal.[448] The voluntary acceptance of costs imposed as a condition to granting a motion for a new trial is not a waiver of the right to an appeal.[449] Where all the defendants will not join in an appeal, the appellant must summon the others and sever from them.[450]

441 Henry v. Merguire, 111 Cal. 1, 43 Pac. 387.

442 Hayes v. Silver Creek & P. Land etc. Co., 136 Cal. 238, 68 Pac. 704; Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381; In re Potter's Estate, 141 Cal. 350, 74 Pac. 986.

443 Peer v. Cookerow, 14 N. J. Eq. 361.

444 Champion v. Plymouth etc. Society, 42 Barb. 441.

445 Hamilton v. Kneeland, 1 Nev. 60.

446 Id.

447 Ricketson v. Compton, 23 Cal. 637.

448 Lahens v. Fielden, 15 Abb. Pr. 177.

449 Tyson v. Wells, 1 Cal. 378; Champion v. Plymouth etc. Society, 42 Barb. 441.

450 Perry v. Block, 1 Mo. 484.

If a party most affected by a reversal is not brought into court, the proceeding in error will be dismissed.[451] The maker of a promissory note can bring an appeal from a judgment against himself and indorser jointly.[452] A married woman, assisted and authorized by her husband in bringing the suit, must join him on the appeal.[453]

§ 1734. Separate appeal.—Any one of several parties, even upon the same side, may appeal without the concurrence of his co-parties;[454] or he may appeal for them all, but cannot afterwards withdraw his appeal as to his co-defendants.[455] In cases of maritime tort against two respondents, if they do not assume a joint defense, each may appeal separate from the other.[456] Where a judgment is not appealed from by one party, an error in favor of the other cannot be corrected.[457] On an appeal by one of several defendants, defects in the complaint which only affect the rights of the defendants not appealing will not be considered.[458] And failure of one appellant to perfect his appeal will not affect the rights of another appellant who has perfected the appeal on his part.[459] The fact that causes were consolidated by order of the court below, upon consent of counsel, will not entitle them to be considered together upon appeal, if there were separate motions for new trials, separate bills of exceptions, and separate appeals in each cause, and each is presented to the appellate court upon its own record.[460]

§ 1735. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in the title on appeals. The party appealing is known as the appellant, and the adverse party as the respondent.[461] It is settled California practice not to transpose

451 Moyer v. Badger Lumber Co., 64 Kan. 885, 67 Pac. 852.

452 Morgner v. Birkhead, 34 Mo. 214.

453 Reese v. Couyers, 16 La. Ann. 39.

454 Mattison v. Jones, 9 How. Pr. 152; Giraud v. Stagg, 4 E. D. Smith, 27; overruling Farrell v. Calkins, 10 Barb. 348. See, also, Peer v. Cookerow, 14 N. J. Eq. 361.

455 Bonner v. Campbell, 48 Pa. St. 286.

456 Thomas v. Lane, 2 Sumn. 1, Fed. Cas. No. 13902. So in equity. Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404.

457 Delassus v. Poston, 19 Mo. 425.

458 Ball v. Nichols, 73 Cal. 193, 14 Pac. 831.

459 Kelley v. Kitsap County, 5 Wash. 521, 32 Pac. 554.

460 Harmon v. San Francisco etc. R. R. Co., 86 Cal. 617, 25 Pac. 124.

461 Cal. Code Civ. Proc., § 938; Mont. Rev. Codes, § 7097.

the names of the parties when the defendant appeals.[462] "By any party" is to be understood any person who is a party to the action.[463] Nor can a party appeal unless he is aggrieved by the decision,—that is, if he has no interest prejudiced thereby.[464] Parties in a quiet-title action who admit they cannot show title in themselves cannot be aggrieved parties.[465] A sheriff restrained from levying an execution on certain land has sufficient interest to appeal from such decree,[466] as has also a purchaser at tax-sales.[467] It will be presumed that a non-appealing defendant is satisfied with the judgment as it stands.[468] A party who recovered judgment and assigned it before the commencement of an action to enjoin the collection of the same cannot be heard.[469] One who is not a party to the record cannot appeal from an order granting a writ of assistance; but he may move to vacate the writ, and thus get on the record, and if his motion is denied, can appeal from the order denying it.[470] If in a suit against a party alleged to be the owner of real estate, and against the real estate, to recover delinquent taxes, judgment is rendered in favor of such party, and against the real estate, he has no ground for appeal, his answer having averred that he did not own the real estate at the time it was assessed.[471] As to who is the party aggrieved, the test is found in the question, Would the party have had the thing if the erroneous judgment had not been given?—if yea, then he is the party aggrieved.[472] Every party whose interest in the subject-matter of the appeal is adverse, or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an "adverse party."[473] A subsequent incumbrancer

462 Peregoy v. Sellick, 79 Cal. 568, 21 Pac. 966.

463 Senter v. De Bernal, 38 Cal. 640.

464 Id.; Foster v. Prince, 8 Abb. Pr. 407; Idly v. Bowen, 11 Wend. 227; Reid v. Vanderheyden, 5 Cow. 719; Kelly v. Israel, 11 Paige, 147; Hughes v. Stickney, 13 Wend. 280; Fairbanks v. Corlies, 3 E. D. Smith, 582; People v. Wilson, 26 Cal. 127; Rankin v. Central Pacific R. R. Co., 73 Cal. 96, 15 Pac. 57; Calderwood v. Brooks, 28 Cal. 153.

465 Flanigan v. Towle, 8 Cal. App. 229, 96 Pac. 507.

466 Heintz v. Brown, 46 Wash. 387, 123 Am. St. Rep. 937, 90 Pac. 211.

467 Pierce Co. v. Bunch, 49 Wash. 599, 96 Pac. 164.

468 Spokane Ranch etc. Co. v. Beatty, 37 Mont. 342, 96 Pac. 727, 97 Pac. 838.

469 Hobbs v. Duff, 43 Cal. 486.

470 People v. Grant, 45 Cal. 97.

471 People v. Wilson, 26 Cal. 127.

472 Adams v. Woods, 8 Cal. 306. See Blythe v. Ayres, 102 Cal. 260, 36 Pac. 522; People v. Pfeiffer, 59 Cal. 89.

473 Senter v. De Bernal, 38 Cal. 640; Ely v. Frisbie, 17 Cal. 250;

cannot object to a judgment of foreclosure rendered against the mortgagor and himself, unless he shows that he will sustain injury from it.[474]

§ 1736. Parties or persons injured.—In a suit to foreclose a contract to sell real estate, where appellant, who was joined with the grantee as a party defendant, disclaimed all interest under the contract, but the court nevertheless entered a decree, void as to her, adjudging her adverse title to the land invalid, she has a right of appeal from such decree.[475] The devisees are the parties specially aggrieved, and are entitled to appeal from an order removing the premises from the effect of the will and vesting title thereto in the heirs of the deceased; and if a homestead is set aside for use of the widow, the executors are "parties aggrieved" within the meaning of the law relative to the right of appeal.[476] An unsuccessful bidder at an executor's sale of real estate, on the ground that it would be insufficient to pay all legacies, is not a party interested.[477] When the judgment purports to determine that parties to the action have no rights in the subject-matter of the controversy, they are aggrieved thereby so as to entitle them to have the judgment reviewed.[478] A judgment for plaintiff for the amount of the debt, with a denial of foreclosure of the trust-deed, is a judgment in favor of plaintiff, and he cannot appeal therefrom.[479] A void judgment does not aggrieve, and cannot be appealed from.[480] Judgment in accordance with voluntary nonsuit, after a motion at the close of plaintiff's testimony to instruct a verdict for defendant, is in favor of defendant, and he cannot appeal therefrom.[481]

Cotes v. Carroll, 28 How. Pr. 436. See Jones v. Quantrell, 2 Idaho, 153, 9 Pac. 418; The Victorian, 24 Or. 121, 41 Am. St. Rep. 838, 32 Pac. 1040; Lilienthal v. Caravita, 15 Or. 339, 15 Pac. 280; Green v. Berge, 105 Cal. 56, 45 Am. St. Rep. 25, 38 Pac. 539; quoting Thompson v. Ellsworth, 1 Barb. Ch. 627. As to who are not "adverse parties," see Hinkel v. Donohue, 88 Cal. 597, 26 Pac. 374. See, also, Jackson County v. Bloomer, 28 Or. 110, 41 Pac. 930.

474 Mann v. Thayer, 18 Wis. 479.

475 Stearns Ranchos Co. v. McDowell, 134 Cal. 562, 66 Pac. 724.

476 In re Levy's Estate, 141 Cal. 646, 99 Am. St. Rep. 92, 75 Pac. 301.

477 In re Robinson's Estate, 142 Cal. 152, 75 Pac. 777.

478 New York Life Ins. Co. v. Brown, 32 Colo. 365, 76 Pac. 799.

479 Murto v. Lemon, 19 Colo. App. 313, 76 Pac. 541.

480 McGinniss v. Boston & M. Cons. etc. Co., 29 Mont. 428, 75 Pac. 89.

481 Florence etc. v. Maloney, 17 Colo. App. 526, 69 Pac. 270.

§ 1737. Joint appeal.—All parties pleading jointly may join in appeal from a decision on their pleading, though review is sought on a point available to one only.[482] And plaintiff and one of the defendants, who are made defendants in a cross-complaint filed by two other defendants, may unite in an appeal from judgment on such cross-complaint.[483] Less than all the defendants in a joint decree cannot appeal without a summons and severance in the court below.[484] From the interlocutory judgment upon such issue appeals may be taken by the party aggrieved, without making any persons parties to the appeal except such as were parties to the issue; but no appeal from the whole of the final judgment can be made effectual unless all of the parties to it are made parties to the appeal, either as appellants or respondents; for such a judgment cannot be reversed without affecting the interest of all who are parties to it.[485] Separate creditors of an insolvent who have a common interest in the reversal or modification of a decree as to the mode of payment of their claims, and who are all aggrieved in the same way and by the same portion of the decree, may prosecute a joint appeal from the decree.[486] Under the Colorado statute,[487] a joint appeal is not maintainable unless each appellant is entitled to an appeal.[488] All parties to a judgment or decree, whose interests may be substantially affected by the adjudication of the appellate court must be included in the appeal; otherwise, such court is without jurisdiction.[489] Wherever an order or decree involves a construction of the proper exercise of the duties of a trustee, or presents a question as to the right or power of the trustee to comply with it, or wherever obedience to it might subject him to liability, even where the

482 Bank of Cooperstown v. Corlies, 1 Abb. Pr. (N. S.) 412.

483 Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

484 Mussina v. Cavozos, 20 How. 280, 15 L. Ed. 878; Smith v. Clark, 12 How. 21, 13 L. Ed. 875.

485 Senter v. De Bernal, 38 Cal. 640.

486 In re California Mut. Life Ins. Co., 81 Cal. 364, 22 Pac. 869.

487 Laws 1889, p. 77.

488 Diamond etc. Min. Co. v. Faulkner, 14 Colo. 438, 24 Pac. 548.

489 Hamilton v. Blair, 23 Or. 64, 31 Pac. 197. See Cline v. Mitchell, 1 Wash. 24, 23 Pac. 1013. As to who may appeal from orders and decrees in probate, see Merrifield v. Longmire, 66 Cal. 180, 4 Pac. 1176; Kerns v. Dean, 77 Cal. 555, 19 Pac. 817; Estate of Noah, 88 Cal. 468, 26 Pac. 361; Norton v. Walsh, 94 Cal. 564, 29 Pac. 1109; Ex parte Orford, 102 Cal. 656, 36 Pac. 928; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Estate of Blythe, 108 Cal. 124, 41 Pac. 33.

order is one merely for the payment of funds, the trustee may appeal therefrom.[490]

§ 1738. Parties to the record.—No persons but those who are parties to the record can be permitted to be heard on an appeal;[491] and the judgment appealed from must be against the party appealing. Sureties on an injunction bond, not being parties to the action, cannot participate in a review of the proceedings.[492] Otherwise as to a purchaser at a judicial sale.[493] A subsequent lienholder may appeal from a direction in a foreclosure decree ordering the sale of mortgaged property for gold coin only.[494] In New York, a defendant who does not appear at any stage of the proceedings for the purpose of contesting any step taken against him cannot appeal.[495] Stockholders who are served with notice, and who appear and contest the proceedings, are parties having a right to appeal, though the corporation is named as defendant.[496] If one is entitled to an amendment of the pleadings to make himself a party in a different capacity, he is entitled to appeal from an order denying such amendment.[497] An administrator may appeal from an order refusing him license to sell property of the estate in order to pay a claim which he has allowed.[498] Defendants who are not served, and as to whom the cause is dismissed at plaintiff's cost, cannot be made plaintiffs in error;[499] but where a decree has been entered against two or more defendants, any one may make an appeal and use the names of all the defendants.[500]

490 Estate of Welch, 106 Cal. 427, 39 Pac. 805.

491 Dendy v. First Nat. Bank, 67 Kan. 856, 71 Pac. 830, 74 Pac. 268; Phillips v. Salmon River Min. Co., 9 Idaho, 149, 72 Pac. 886; Harrison v. Nixon, 9 Pet. 483, 9 L. Ed. 201; Fish v. Johnson, 16 La. Ann. 29; In re Bristol, 16 Abb. Pr. 397; E. B. v. E. C. B., 28 Barb. 299; People v. Lynch, 54 N. Y. 681; Guion v. Insurance Co., 109 U. S. 173, 27 L. Ed. 895, 3 Sup. Ct. 108; Fischer v. Hanna, 21 Colo. 9, 39 Pac. 420.

492 Carson Mining Co. v. Hill, 7 Colo. App. 141, 42 Pac. 678.

493 Delaplaine v. Lawrence, 10 Paige, 602; Bailey v. Maule, 7 Cl. & Fin. 121; Mortimer v. Nash, 17 Abb. Pr. 229, note.

494 Miller v. Cherry, 2 Nev. 165.

495 Sands v. Hildreth, 12 Johns. 493; Colden v. Knickerbacker, 2 Cow. 31; Kane v. Whittick, 8 Wend. 219; Murphy v. American Life Ins. etc. Co., 25 Wend. 249.

496 Bennett v. Thorne, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

497 Pugmire v. Diamond, 26 Utah, 115, 72 Pac. 385.

498 In re Smith Est., 43 Or. 595, 73 Pac. 336, 75 Pac. 133.

499 Patterson v. Morrell H'dware Co., 19 Colo. App. 414, 75 Pac. 592.

500 Stratton's Independence v. Mid-

Where some of several defendants make default, and others answer, the defaulting defendants may appeal.[501] A party in whose favor a decision is made, if injured thereby, may appeal therefrom.[502] Third persons not interested in the suit should not be made parties on appeal.[503] That the appellant has no interest in the decree from which he appeals cannot be allowed to defeat the appeal.[504]

§ 1739. **Substituted party.**—Upon the death or disability of a party pending an appeal, his representative shall be substituted in the suit, by proper proceedings for that purpose in the trial court, and by suggestion thereafter to the appellate court.[505] If the substitution of a new party as appellant is procured first in the supreme court, a like substitution should be made in the trial court; but as a general rule the substitution should be made in the trial court first and the order of the trial court presented to the supreme court.[506] The substitution of a party after judgment, except in case of death or disability, is not necessary to the prosecution or defense of an appeal.[507] The right to prosecute an appeal is not affected by the use of the name of one of the original parties after his death, where the executor and heirs have been substituted.[508] The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision or departing from the ordinary procedure, except as to the entry of judgment, which should be of a day anterior to the appellant's death. The rule is different if the death occurs previous to argument.[509] But where the appellate court, not aware of the appellant's death, rendered judgment of affirmance, upon subsequent suggestion this judgment will be vacated and a judgment of affirm-

land Terminal Ry Co., 32 Colo. 493, 77 Pac. 247.

501 Gimmy v. Doane, 22 Cal. 635.

502 Parker v. Newland, 1 Hill, 87.

503 Patten v. Powell, 16 La. Ann. 128. So in equity: Thompson v. Cox, 8 Jones, L. (53 N. C.) 311.

504 Ricketson v. Compton, 23 Cal. 636.

505 Rule 16, Cal. Sup. Ct.; Beach v. Gregory, 2 Abb. Pr. 203; Miller v. Gunn, 7 How. Pr. 159; Hastings v. McKinley, 8 How. Pr. 175. See Davies-Henderson Lumber Co. v. Gottschalk, 81 Cal. 641, 22 Pac. 860; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

506 Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156.

507 Culver v. Randle, 45 Or. 491, 78 Pac. 394.

508 Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 110 Am. St. Rep. 986, 79 Pac. 22, 70 L. R. A. 341.

509 Black v. Shaw, 20 Cal. 68.

ance rendered as of a day previous to the death, *nunc pro tunc*.[510] The death of a party before appeal taken may be shown in the supreme court by affidavit. The suggestion may be made in any court and at any stage of the proceedings.[511] The bankruptcy of an appellant, though adjudicated before the appeal, will not prevent its prosecution in his name; nor can the respondents object thereto. The appeal may be prosecuted in the name of the bankrupt or in that of his assignee.[512] A substitution, on the ground of transfer of interest, must be set in motion by the plaintiff or his vendee.[513]

§ 1740. Substitution—Transfer of interest.—After a decree of foreclosure and appeal therefrom, if the owner of the land conveys to a third person and thereafter dies, it is proper to substitute such third party.[514] If a public administrator resigns his office, it abates any appeal he may have pending from an order of the court refusing him letters of administration; his successor cannot be substituted.[515] A purchaser of real estate which is damaged by a public nuisance, pending appeal of an action started by the original owner to restrain the continuance of the nuisance, is entitled to be substituted in his place.[516]

A writ of error will be dismissed on the death of the respondent, if plaintiff fails to make the personal representatives of the decedent parties thereto.[517] If a controversy solely involves the title to real estate, the purchaser's heirs or legatees are necessary parties, as well as his administratrix.[518] The death of a petitioner in error before determination of the cause does not abate it.[519]

510 Black v. Shaw, 20 Cal. 68; Savings and Loan Soc. v. Gibb, 21 Cal. 595, 609.

511 Judson v. Love, 35 Cal. 463; Shartzer v. Love, 40 Cal. 96. See McCreery v. Everding, 44 Cal. 284.

512 O'Neil v. Dougherty, 46 Cal. 575.

513 Moss v. Shear, 30 Cal. 467; Hestres v. Brennan, 37 Cal. 388.

514 Fay v. Steubenrauch, 138 Cal. 656, 72 Pac. 156.

515 In re Lermond's Estate, 142 Cal. 585, 76 Pac. 488.

516 Raker v. North West Building etc. Co., 33 Wash. 677, 74 Pac. 825.

517 Smith v. Stillwell, 9 Ariz. 226, 227, 80 Pac. 333.

518 Brooks v. Fithian, 67 Kan. 850, 73 Pac. 903.

519 Field v. Leiter, 16 Wyo. 1, 125 Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622.

CHAPTER LXII.

APPEALS FROM SUPERIOR COURT TO THE SUPREME COURT IN PROBATE AND OTHER PROCEEDINGS.

§ 1741. Right of appeal.—It may be laid down as a sound proposition that administrators, general or special, like receivers and other trustees or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and, therefore, will not be heard on appeal from such orders. But this rule has its well defined limitations. Wherever an order or decree involves a construction of the proper exercise of the duties of the officer, wherever it presents a question as to the right or power of the trustee to comply with it, wherever obedience might subject him to liability, the rule does not operate.[1] In Idaho, any party dissatisfied with final judgment in a civil action in the probate court may appeal to the district court, whether such judgment was on the merits, on questions of law, or for want of an answer.[2]

§ 1742. In probate proceedings.—An appeal may be taken to the supreme court from a judgment or order of the probate court, as follows: 1. Granting, refusing, or revoking letters testamentary, or of administration, or of guardianship; 2. Admitting or refusing to admit a will to probate; 3. Against or in favor of the validity of a will, or revoking the probate thereof; 4. Against or in favor of setting apart property, or making an allowance for a widow or child; 5. Against or in favor of directing the partition, sale, or conveyance of real property; 6. Settling an account of an executor or administrator or guardian; 7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; 8. Granting or overruling a motion for a new trial; 9. Confirming or refusing to confirm a report of an appraiser setting apart the homestead.[3] But an order of the probate court setting aside a judgment of that court refusing

1 In re Welch's Estate, 106 Cal. 427, 39 Pac. 805.

2 Idaho Rev. Codes, § 4838; Smith v. Clyne, 15 Idaho, 254, 97 Pac. 40

3 Cal. Code Civ. Proc., § 963; Idaho Rev. Codes, § 4831.

to admit a will to probate is not appealable;[4] nor is an order refusing to quash an execution;[5] nor is an order denying a motion to vacate an order setting aside a homestead.[6] When an executor or administrator who has given an official undertaking appeals from a judgment or order of the probate court made in the estate which he represents, his official undertaking stands in the place of an undertaking on appeal, and his sureties thereon are liable.[7] In New Mexico, no appeal lies from the probate to the district court, except from a final order, decision, or judgment.[8]

Prior to the act of 1905 providing for appeals from the probate courts in matters pertaining to lunatics and habitual drunkards, no right of appeal in such cases existed in Kansas.[9]

§ 1743. Contested elections.—The supreme court has jurisdiction on appeal in contested election cases.[10]

§ 1744. Orders not appealable.—No appeal lies from the appointment of a special administrator;[11] nor from an order setting aside its own proceedings had by the probate court before final order, upon application of the surviving wife for a homestead.[12] But an order dismissing a petition to have an administrator show cause why an allowed claim should not be paid was held to be appealable.[13] Appeal does not lie from an order refusing to set aside an order of sale.[14] Under the California practice, appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in section 963 of the Code of Civil Procedure.[15] An order settling the account of an executor or administrator is appealable.[16] So of an order made in a pro-

4 Peralta v. Castro, 15 Cal. 511.

5 Blum v. Brownstone, 50 Cal. 293.

6 In re Cahill's Estate, 142 Cal. 628, 76 Pac. 383.

7 Cal. Code Civ. Proc., § 970.

8 In re Gentz's Estate (N. Mex.), 93 Pac. 702.

9 State v. McCowen, 71 Kan. 497, 80 Pac. 954.

10 Cal. Code Civ. Proc., § 1126; Knowles v. Yates, 31 Cal. 82; Day v. Jones, 31 Cal. 261; Webster v. Byrnes, 34 Cal. 273; Lord v. Dunster, 79 Cal. 477, 21 Pac. 865.

11 Cal. Code Civ. Proc., § 1413.

12 Johnson v. Tyson, 45 Cal. 257. See, also, Peralta v. Castro, 15 Cal. 511.

13 Estate of McKinley, 49 Cal. 152.

14 Estate of Smith, 51 Cal. 563.

15 In re Moore, 86 Cal. 58, 24 Pac. 816; In re Walkerly, 94 Cal. 352, 29 Pac. 719. See In re Smith, 98 Cal. 639, 33 Pac. 744; Harper v. Hildreth, 99 Cal. 269, 33 Pac. 1103; Ex parte Orford, 102 Cal. 657, 36 Pac. 928.

16 Estate of Couts, 87 Cal. 480, 25 Pac. 685; Estate of Rose, 80 Cal. 166, 22 Pac. 86.

ceeding for the settlement of the estate of a decedent, authorizing an executor to mortgage the lands of the estate.[17] So of an order of the probate court appointing a guardian of a minor.[18]

§ 1745. Parties.—On an appeal from an order removing a guardian of an estate and appointing another guardian in his place, taken by the removed guardian, the newly appointed guardian is a necessary party.[19] Where the probate court settles the basis upon which an account shall be stated, and directs that if the administrator refuse to so state it the creditor shall do so, the error, if any, of ordering the creditors to state the account is immaterial on appeal by the administrator;[20] nor can an executor maintain an appeal from an order of distribution on the ground that the distribution is not made in proper proportions, as he has no interest in that question.[21] An appeal from an order making an allowance for services of an executor's attorney, under section 1616 of the California Code of Civil Procedure, may be taken by either the attorney or any person interested in the estate.[22]

§ 1746. Transcript.—The alternative method of perfecting an appeal,[23] and the alternative method of preparing the record on appeal,[24] may be used in place of the old method, as well in appeal in probate matters as in civil.[25] The merits of an appeal from a probate order can ordinarily be fully reached on a bill of exceptions to the order itself, without a motion for a new trial.[26] Where a case is submitted on pleadings, a motion for a new trial is not necessary for an appeal.[27] On an appeal from a decree of a probate court on a final accounting and settlement, the petition and account filed with a view to the final settlement are a part of the record to be used on appeal.[28] The statement must state specifically the particular errors or grounds upon which the appellant intends to rely.[29]

17 Estate of McConnell, 74 Cal. 217, 15 Pac. 746.

18 Guardianship of Get Young, 90 Cal. 77, 27 Pac. 158.

19 Guardianship etc. of Medbury, 48 Cal. 83.

20 Estate of Miner, 46 Cal. 564.

21 Estate of Wright, 49 Cal. 550.

22 In re Riviere's Estate, 7 Cal. App. 755, 96 Pac. 16.

23 Cal. Code Civ. Proc., §§ 941a-941c; Cal. Stats., 1907, p. 753.

24 Cal. Code Civ. Proc., §§ 953a-953c; Cal. Stats., 1907, p. 750.

25 In re McPhee's Estate, 154 Cal. 385, 97 Pac. 878. For alternative method see post, § 1749.

26 In re Geary's Estate, 146 Cal. 105, 79 Pac. 855.

27 Board of Commissioners v. Shaffner, 10 Wyo. 181, 68 Pac. 14.

28 Estate of Isaacs, 30 Cal. 105.

29 Estate of Boyd, 25 Cal. 511.

CHAPTER LXIII.

PERFECTING AN APPEAL.

§ 1747. Perfecting appeals.—An appeal is perfected when a proper undertaking, with an affidavit of the sureties, has been executed, and notice of appeal served on the adverse party and the clerk, and from that time proceedings are stayed.[1] The time when an appeal shall be deemed perfected is not affected in any way by the respondent's filing in the cause a written waiver of all exceptions to the sufficiency of the sureties in the undertaking.[2] The certificate of the clerk, attached to the transcript on appeal, that "a good and sufficient undertaking on appeal, in due form, was properly filed," if in conformity to section 953 of the California Code of Civil Procedure is *prima facie* sufficient.[3] An appeal is not taken until notice thereof is filed and served, both of which acts must be done within the statutory time.[4] Until an appeal is taken, there is nothing to give effect to an undertaking.[5] Perfecting an appeal does not release the lien acquired by docketing the judgment,[6] unless the enforcement of the judgment be stayed by a proper bond.[7]

§ 1748. Appeals, how taken.—There is no distinction as to the mode of taking and perfecting appeals, or as to the effect of them, between cases at law and cases in equity.[8] Under the laws of Washington, an equity case is reviewable upon the law, without the production of a complete record.[9] Three things are necessary to the taking and perfecting of an appeal: 1. Filing notice; 2. Service of the same; 3. Filing the undertaking—all within the times limited by statute. The period allowed the

1 Ford v. Thompson, 19 Cal. 118; Pierson v. McCahill, 23 Cal. 250; Thompson v. Blanchard, 2 N. Y. 561; Straat v. Blanchard, 14 Colo. 445, 24 Pac. 561.

2 Callahan v. Portland etc. R. R. Co., 17 Or. 556, 21 Pac. 870.

3 Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

4 Moe v. Harger, 10 Idaho, 302, 77 Pac. 645.

5 Buckholder v. Byers, 10 Cal. 481.

6 Low v. Adams, 6 Cal. 277.

7 Cal. Code Civ. Proc., § 671.

8 Lyons v. Lyons, 18 Cal. 448; the rule as laid down in Walker v. Sedgwick, 5 Cal. 192, being changed.

9 Howard v. Shaw, 10 Wash. 151,

respondent to except to the sufficiency of the sureties cannot be abridged by error or negligence of the appellant.[10] It is always within the power of the court to extend the time fixed by law for filing papers in a cause, when the ends of justice would seem to demand it.[11] But this does not apply to the service of notices on appeal.[12] In all casese where an appeal is given by statute, the remedy is exclusive, and must be pursued;[13] but an appellate court may obtain jurisdiction by voluntary appearance by an adverse party.[14] A remedy cannot be extended beyond the provisions of the statute which gives it, and if the act does not give an appeal, none lies.[15] If the act conferring the jurisdiction expires, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act.[16] An appeal may be brought by the state or the people thereof, or any officer thereof, or any county, city, or town, by filing and serving notice of appeal as above, without the filing of a bond or the payment of costs.[17] The court below may, in its discretion, dispense with or limit the security required by the code on appeal, when the appellant is an executor, administrator, trustee, or other person acting in another's right.[18] A party cannot appeal a second time from the same judgment, the first appeal having been dismissed.[19] The rule is otherwise in California. Where an appeal is dismissed for want of proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law.[20] Where an appeal has been regularly perfected, and is pending in the supreme court, a second appeal from the judgment, attempted to be taken by the same party, is a nullity, and will be dismissed.[21]

38 Pac. 746. See Gilbranson v. Squier, 5 Wash. 99, 31 Pac. 423; Travis v. Ward, 2 Wash. 30, 25 Pac. 908.

10 Hastings v. Halleck, 10 Cal. 31.

11 Wood v. Forbes, 5 Cal. 62.

12 Cal. Code Civ. Proc., § 1054.

13 Haight v. Gay, 8 Cal. 297, 68 Am. Dec. 323.

14 Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225.

15 United States v. Nourse, 6 Pet. 470, 8 L. Ed. 467.

16 Butler v. Palmer, 1 Hill, 328; Surtees v. Ellison, 9 Barn. & Cress. 750, 3 Burr. 1456; Key v. Goodwin, 4 Moo. & P. 341; McNulty v. Batty, 10 How. 72, 13 L. Ed. 333.

17 See Cal. Code Civ. Proc., § 1058.

18 Cal. Code Civ. Proc., § 946. See Scheerer v. Edgar, 67 Cal. 377, 7 Pac. 760.

19 Brill v. Meek, 20 Mo. 358.

20 Martinez v. Gallardo, 5 Cal. 155. See Dooling v. Moore, 19 Cal. 81; Gordon v. Wansey, 19 Cal. 82.

21 Brown v. Plummer, 70 Cal. 337, 11 Pac. 631.

§ 1749. Alternative method of taking appeal.—The legislature of California in 1907 adopted both a new and alternative method by which appeals might be taken,[22] and likewise a new and alternative method of preparing the record.[23] This new or alternative method does not repeal the old method, but is to be used in place of the old method, at the option of appellant, and has been approved by the supreme court. If the steps taken on appeal are sufficient under either method, the appellate court gets jurisdiction.[24]

The alternative method of appeal dispenses with the filing of an undertaking for costs, and the service of notice of appeal. Any person having a right of appeal, may appeal by filing with the clerk of the court in which the judgment, order, or decree is entered, a notice of appeal, at any time within sixty days after notice of rendition of such judgment or order has been served on the attorney of record. The filing of such notice of appeal immediately transfers the cause for decision and determination to the higher court.[25]

The reasonableness and constitutionality of the new method have been discussed by the supreme court.[26] The counsel of record are constructively in court during pendency of the action. The statute fixes the time in which the notice of appeal may be filed, and the respondent can readily ascertain, by examining the records and files of the case in the clerk's office, whether it has in fact been filed.

There is but one remedy,—an appeal,—but there are two methods of asserting the appeal. There is nothing in the act requiring appellant to make an election as to the method which he shall adopt in taking his appeal. He may insist that he has perfected an appeal under the new method, even if he has unsuccessfully attempted to make a good service of notice, or filed an insufficient cost-bond according to requirements of the old. His appeal is not imperiled because, in an attempt at cautiousness, he has erred in some matter of procedure which he might have omitted. The two methods are not exclusive. The old includes the only essential in the new—the filing of notice.[27]

22 Code Civ. Proc., §§ 941a-941c; Stats., 1907, p. 753, ch. 410.

23 Code Civ. Proc., §§ 953a-953c; Stats., 1907, p. 750, ch. 408.

24 Mitchell v. California S. S. Co., 154 Cal. 731, 99 Pac. 202.

25 Code Civ. Proc., § 941b.

26 In re McPhee's Estate, 154 Cal. 385, 97 Pac. 878.

27 Mitchell v. California S. S. Co., 154 Cal. 731, 99 Pac. 203.

§ 1750. **Supersedeas or stay of proceedings.**—One is not entitled to a stay-bond until he has appealed; his desire to appeal is not sufficient.[28] A stay of proceedings by a receiver is permissible pending an appeal from an order denying permission to sue such receiver.[29] An injunction restraining defendant from running a shooting-gallery is a preventive and not a mandatory injunction, and defendant is not entitled, as a matter of right, to supersede the order pending appeal.[30] There can be no stay without direction of the trial court, on appeal by defendant in unlawful detainer.[31]

The effect of a judgment as evidence of the matters determined is suspended by an appeal, but execution is not stayed.[32] Plaintiff may file a transcript of the judgment with the clerk and recorder, though appeal has been taken.[33] Defendant cannot complain of any damages done by having an execution issued and levied prior to the time he files his bond on appeal.[34] No bond being required of a city, its mere appeal supersedes the judgment and any execution thereon.[35]

If a *supersedeas* fails because the sureties do not justify, the supreme court will allow a proper undertaking to be filed to stay the proceedings.[36] The supreme court has such inherent powers as are necessary to enable it to exercise its appellate jurisdiction, and to that end may issue a temporary restraining order.[37] Upon giving the three-hundred-dollar bond required, appellant is entitled to a *supersedeas* of judgment for foreclosure of a pledge of stock.[38] An order in the nature of a restraining order should fix the amount of the *supersedeas* bond required to stay the execution of the order pending an appeal.[39]

28 DeLeonis v. York, 140 Cal. 333, 73 Pac. 1058.

29 State v. Superior Court, 38 Wash. 23, 80 Pac. 195.

30 State v. Superior Court, 39 Wash. 115, 109 Am. St. Rep. 862, 80 Pac. 1108, 1 L. R. A. (N. S.) 554; Maloney v. King, 26 Mont. 492, 68 Pac. 1014; Maloney v. King, 26 Mont. 487, 68 Pac. 1012; State v. Superior Court, 28 Wash. 403, 68 Pac. 865.

31 Sarthou v. Reese, 151 Cal. 96, 90 Pac. 187; Cal. Code Civ. Proc., § 1176.

32 Di Nola v. Allison, 143 Cal. 106, 101 Am. St. Rep. 84, 76 Pac. 976, 65 L. R. A. 419.

33 Mulligan v. Smith, 32 Colo. 404, 76 Pac. 1063.

34 Id.

35 Jordan v. City of Seattle, 29 Wash. 581, 70 Pac. 54.

36 Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 Pac. 653.

37 Livesley v. Krebs Hop Co. (Or.), 97 Pac. 718.

38 Rohrbacher v. Superior Court, 144 Cal. 631, 78 Pac. 22; Cal. Code Civ. Proc., § 949.

39 State v. Superior Court, 30 Wash. 177, 70 Pac. 256.

If a mortgagee does not file his mortgage as a claim against the estate of the mortgagor, and is thus not entitled to recover any deficiency therefrom, in an action to foreclose, if the receiver does not take possession and control of the premises pending foreclosure, and there is nothing to prevent the administrator or his tenants from committing waste, a *supersedeas* will not be granted without the giving of a stay-bond.[40] The sale of personal property under judgment of foreclosure cannot be stayed without the filing of a stay-bond.[41]

A petition in the supreme court for a *supersedeas,* staying judgment in unlawful detainer during pendency of an appeal, will not be granted if there is no order of the judge before whom the case was tried directing a stay.[42] The fact that a life-insurance policy may be disposed of will not prevent a writ of *supersedeas* from issuing to prevent the threatened sale.[43] One not a party to the action, nor subject to the control of the appellate court, cannot have a writ of *supersedeas* directed to it, in condemnation proceedings. In absence of a statutory provision, a trial court will not be required by mandate to fix a bond superseding a prohibitory injunction, but the appellate court may do so itself.[44]

§ 1751. Effect of appeal.—It is also provided by statute that when the appeal is perfected as prescribed by code sections 936 to 945 it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from.[45] Upon an appeal which stays proceedings the subject-matter is removed from the jurisdiction of the lower court until the appeal has been determined.[46] But until judgment is entered the trial court retains complete jurisdiction of an action of which it cannot

40 Bank of Woodland v. Stephens, 137 Cal. 458, 70 Pac. 293.

41 Tolle v. Hydenfeldt, 138 Cal. 56, 70 Pac. 1013.

42 Cluness v. Bowen, 135 Cal. 660, 67 Pac. 1048; Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922.

43 Commercial Bank v. Hornberger, 134 Cal. 90, 66 Pac. 74.

44 Lund v. Idaho etc. R. R., 48 Wash. 453, 93 Pac. 1071.

45 Cal. Code Civ. Proc., § 946.

46 Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

be divested by an unauthorized appeal.[47] And such is the effect in all cases not otherwise specially provided for. It applies to an order granting a new trial,[48] or upon an order granting an injunction;[49] but it will not dissolve or suspend an injunction,[50] nor prevent the parties from settling the suit.[51] The exceptions to the general rule in regard to a stay of proceedings are, when the judgment or order appealed from directs the sale of perishable property, or where it adjudges the defendant guilty of usurping, intruding into, or unlawfully holding a public office, civil or military, and also where the order grants or refuses to grant a change of the place of trial of an action.[52] It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted.[53] The taking of an appeal does not operate to discharge an attachment.[54] In California, an appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained, and unless within five days after the entry of the order appealed from such appeal be perfected.[55] In New York, an appeal with security does not discharge a previous levy.[56] But the court may in its discretion discharge a levy upon motion.[57] In California, a bond staying execution releases a levy.[58] An appeal from a decree for an injunction, duly perfected, will suspend proceedings to punish its violation.[59] As a general rule, an in-

47 Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

48 Ford v. Thompson, 19 Cal. 118.

49 Hoyt v. Gelston, 13 Johns. 139; Genin v. Chadsey, 12 Abb. Pr. 69; Howe v. Searing, 6 Bosw. 684; Wood v. Dwight, 7 Johns. Ch. 295; Hart v. Mayor of Albany, 3 Paige, 381.

50 Merced Min. Co. v. Fremont, 7 Cal. 130; Hicks v. Michael, 15 Cal. 109.

51 Wagner v. Goldschmidt (Or.), 93 Pac. 689.

52 Cal. Code Civ. Proc., § 949.

53 Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60.

54 Spencer v. Rogers Locomotive Works, 13 Abb. Pr. 180.

55 Code Civ. Proc., § 946.

56 Stricker v. Wakeman, 13 Abb. Pr. 85; Smith v. Allen, 2 E. D. Smith, 259.

57 N. Y. Code 1877, § 1311; Stricker v. Wakeman, 13 Abb. Pr. 85.

58 Code Civ. Proc., § 946. Prior to 1874 it was otherwise. See Ewing v. Jacobs, 49 Cal. 72.

59 Howe v. Searing, 6 Bosw. 684. See Swift v. Shepard, 64 Cal. 423, 1 Pac. 493; Heinlen v. Cross, 63 Cal. 44; Bullion etc. Min. Co. v. Eureka etc. Min. Co., 5 Utah, 151, 13 Pac. 174;

junction is not dissolved or suspended by an appeal. But where the judgment commands or permits some act to be done, the proceedings are stayed by the perfecting of an appeal, as to all affirmative action looking to the execution of the terms of the decree.[60] Where the decree merely directs certain payments to be made, it is sufficient as a stay of proceedings.[61] The stay of proceedings derived from taking an appeal does not prevent a filing of the transcript previously procured.[62] It does not prevent the party who by the judgment appealed from was declared to be entitled to the office from proceeding to compel the delivery of books and papers to him.[63] The giving of a *supersedeas* bond by one appealing from an order discharging a receiver does not reinstate the receiver or authorize the court to maintain possession of the property.[64] An appeal from an order appointing a receiver does not deprive the parties of the right to a trial of the cause on the merits pending the appeal.[65]

§ 1752. The same—On lower court.—The right of the lower court to correct a clerical misprision on the face of the records of a cause is not lost by an appeal, when the correction does not affect any substantial right.[66] An appeal from an order granting letters of administration does not deprive the lower court of the right to proceed under a special administration of the estate previously started;[67] and a judgment may be amended so as to conform to the verdict after an appeal has been taken;[68] and this correction may be made even after the judgment has been affirmed by the supreme court, if it appears that the error was not considered by the supreme court, and the whole record clearly shows that it is a clerical mistake.[69] Such a correction

Slaughter-House Cases, 10 Wall. 273, 19 L. Ed. 915; Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333.

60 Stewart v. Superior Court, 100 Cal. 543, 35 Pac. 156, 563. As to the effect of appeal from an order of reference, see Smith v. Pollock, 2 Cal. 92. From an order confirming a survey of a Mexican grant, see Thornton v. Mahoney, 24 Cal. 569. But as to its effect as a stay generally, see Tiers v. Carnahan, 3 Abb. Pr. 69.

61 Curtis v. Leavitt, 10 How. Pr. 481.

62 Bulkeley v. Keteltas, 3 Sandf. 740.

63 Welch v. Cook, 7 How. Pr. 282.

64 State v. Superior Court, 31 Wash. 481, 71 Pac. 1095.

65 State v. Bell, 36 Wash. 196, 78 Pac. 908.

66 Fay v. Steubenrauch, 141 Cal. 573, 75 Pac. 174.

67 In re Heaton's Estate, 142 Cal. 116, 75 Pac. 662.

68 City of Denver v. Bradbury, 19 Colo. App. 441, 75 Pac. 1077.

69 Edinburgh Lombard Inv. Co. v. Walsh, 70 Kan. 899, 79 Pac. 688.

is not the rendition of a new judgment nor the changing of a judgment which has been affirmed by the supreme court.

The lower court may issue an injunction to preserve the property in dispute, though the cause has been removed by appeal to the supreme court.[70] An appeal in a proceeding against a trustee to compel an accounting from an order relating to the account before a certain date does not preclude the trial court from making an order in reference to the trustee's accounts subsequent to such date.[71] An appeal from an order does not divest the trial court of jurisdiction to make subsequent orders in the cause, but, at most, is only matter in abatement, or suspension of judgment.[72] If the lower court vacates an order, and thereafter makes a second order vacating the first one, because of being misled in making the former order, an appeal from the second order does not have the effect to revive the first one.[73]

When the notice of appeal has been duly filed and served and the bond has been filed with the lower court, that court is ousted of jurisdiction over the appeal,[74] and the supreme court then possesses the sole power to make orders with reference to the custody and control of minor children pending the appeal.[75] The lower court cannot, after appeal, amend a judgment in replevin so as to make it an alternative judgment,[76] or allow a third party to intervene.[77] The supreme court, and not the trial court, has the right to issue an injunction pending the appeal.[78] The appellate court acquires jurisdiction of the appeal from the time the notice of appeal is given or served, within the time required, though the undertaking is not served;[79] but an unauthorized appeal confers no jurisdiction except to make an order of dismissal.[80]

70 Ajax Gold Min. Co. v. Hilkey, 30 Colo. 115, 69 Pac. 523.

71 Gardner v. Stare, 136 Cal. xix, 69 Pac. 426.

72 Id.; Wittler-Corbin Machinery Co. v. Martin, 47 Wash. 123, 91 Pac. 629.

73 Bateman v. Superior Court, 139 Cal. 140, 72 Pac. 922; Ætna Ins. Co. v. Thompson, 34 Wash. 610, 76 Pac. 105.

74 Glavin v. Lane, 29 Mont. 228, 74 Pac. 406.

75 Irving v. Irving, 26 Wash. 122, 66 Pac. 123; Vosburg v. Vosburg, 137 Cal. 493, 70 Pac. 473.

76 Hynes v. Barnes, 30 Mont. 25, 75 Pac. 523.

77 Hight v. Batley, 32 Wash. 165, 98 Am. St. Rep. 851, 72 Pac. 1034.

78 Finlen v. Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517.

79 Dowell v. Bolt, 45 Or. 89, 75 Pac. 714.

80 Humbird Lumber Co. v. Morgan, 10 Idaho, 327, 77 Pac. 433.

§ 1753. **Amendment of notice.**—A notice, when served, is amendable in respect of defects which do not destroy its substantial character,[81] and mere formal errors may be disregarded.[82] But a notice cannot be amended so as to include an order or judgment not in the original notice.[83] An oral notice cannot be amended.[84] When there is a failure to give in good faith notice of appeal, no amendment can be allowed.[85]

§ 1754. **Filing notice.**—In California, a notice of appeal given before July 1, 1874, was required to be filed on the same day it was served. The amendments to section 940 of the Code of Civil Procedure, if it changed the rule in this respect, did not take effect until July 1, 1874.[86] Formerly the filing of the notice was required to precede the service of it, or be contemporaneous with it, but the order of service is now immaterial.[87] When notice is filed on the day on which judgment is entered, the appeal is not premature, although the notice was served on the preceding day.[88] Where a notice of appeal is filed one day before expiration of time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after filing notice of appeal, it was held that the appeal was taken in time.[89] Where a notice of appeal to the circuit court from an appraisal of lands was informally served, and afterwards filed with the clerk of the railroad company, and he was made acquainted with its contents, it was not error for the court to refuse to dismiss the appeal on that ground.[90]

§ 1755. **Filing and serving notice.**—An appeal is made by filing and serving the notice. Both requisites must exist to complete the appeal,[91] and must be within the time prescribed

81 Fry v. Bennett, 16 How. Pr. 385.

82 People v. Tarbell, 17 How. Pr. 120; Sherman v. Wells, 14 How. Pr. 522, 526.

83 Fry v. Bennett, 16 How. Pr. 385; Bryant v. Bryant, 4 Abb. Pr. (N. S.) 138. See Whitley v. Leeds, 27 How. Pr. 378.

84 People v. Eldridge, 7 How. Pr. 108.

85 Id.; Cotes v. Carroll, 28 How. Pr. 436.

86 Dinan v. Stewart, 48 Cal. 567.

87 See Code Civ. Proc., § 940; Galloway v. Rouse, 63 Cal. 280; Hewes v. Carville, 62 Cal. 516.

88 Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475. See Spokane Falls v. Browne, 3 Wash. 84, 27 Pac. 1077; Dwyer v. Schlumpf, 6 Wash. 25, 32 Pac. 1005.

89 Peran v. Monroe, 1 Nev. 484.

90 Black v. Chicago R. R. Co., 18 Wis. 208.

91 Whipley v. Mills, 9 Cal. 641;

by law[92] to give jurisdiction to the appellate court.[93] The statutory provision[93a] extending the time in which acts may be done in certain cases, has no application to the service of a notice of appeal.[94] The omission of serving the notice of appeal on the clerk within the time limited therefor cannot be rectified.[95] The fact that the party to be served is absent from the state does not dispense with service.[96] Where notice of appeal and undertaking were filed in the clerk's office on the same day, and on the next day a copy of the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties, it was held that respondent was not injured by failure to serve a copy of the notice on the day the undertaking was filed.[97] It is not competent for the parties to waive notice of appeal.[98]

In Idaho, the appeal must be taken within sixty days,[99] and the sufficiency of evidence to support the judgment may be reviewed on appeal from an order denying a new trial taken within sixty days after such order was made, though it be too late to take an appeal from the judgment itself.[100]

§ 1756. Proof of service.—Service of notice may be proved by the affidavit of a third person.[101] Where such affidavits only disclose that the affiant, who was a third person, mailed a copy of the notice at Santa Cruz, directed to the respondent's attorneys at San Francisco, but did not state that the attorney for

Lambert v. Moore, 1 Nev. 344; People v. Eldridge, 7 How. Pr. 108.

92 Hastings v. Halleck, 10 Cal. 31. See, also, Dalzell v. Superior Court, 67 Cal, 453, 7 Pac. 910; In re Eyres, 6 Wash. 132, 32 Pac. 1073; Parker v. Denny, 2 Wash. T. 360, 7 Pac. 892; Davey v. Mulroy, 7 Cal. App. 1, 93 Pac. 297; Rodman v. Manning, 50 Or. 506, 93 Pac. 366.

93 Brown v. Green, 65 Cal. 221, 3 Pac. 811.

93a Cal. Code Civ. Proc., § 1013.

94 Bonds v. Hickman, 29 Cal. 460; Bell v. Holford, 1 Duer, 58. See, also, De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

95 Morris v. Morange, 26 How. Pr. 247; Ellsworth v. Fulton, 24 How. Pr. 20; People v. Eldridge, 7 How. Pr. 108. As to necessity of service of notice of appeal upon the clerk of the court where the judgment was entered, see Territory v. Hanna, 5 Mont. 246, 5 Pac. 250.

96 Eckstein v. Calderwood, 34 Cal. 658. See Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013.

97 Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

98 Sawtelle v. Weymouth, 14 Wash. 21, 43 Pac. 1101.

99 Oliver v. Kootenai County, 13 Idaho, 281, 90 Pac. 107; Fanney v. American Bonding Co., 13 Idaho, 534, 90 Pac. 859, 91 Pac. 318; Idaho Rev. Codes, §§ 4807, 4808.

100 White v. Whitcomb, 13 Idaho, 490, 90 Pac. 1080.

101 Moore v. Besse, 35 Cal. 186.

whom he acted resided at Santa Cruz, it was held that the affidavit was defective.[102] Affidavit of service on respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that notice was left there in a conspicuous place between the hours of eight in the morning and six o'clock in the afternoon.[103] Where notice has been properly served by personal or substituted service, appellant may, on motion to dismiss appeal, move for leave to supply omitted proof of service; upon leave being granted, he may file in the court below the requisite affidavit or official certificate of service, and a certified copy thereof may be annexed to the record in the appellate court.[104] An acknowledgment of service indorsed on the notice as follows: "Due service of a copy of the within notice is hereby accepted to have been made this twentieth day of February, 1863," is no waiver of an objection that service upon the day mentioned is too late.[105] A written acknowledgment of such service by one of the parties is insufficient to authorize the court to assume jurisdiction without proof of the authenticity of the signature.[106]

§ 1757. Service, how and when made.—Notice of appeal taken by the people, in a criminal case, must be served on the defendant personally.[107] It must affirmatively appear in the record that a copy of the notice has been served on the adverse party or his attorney.[108] The notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs or defendants, or interveners.[109] The fact that a party whose interests are adverse

102 Moore v. Besse, 35 Cal. 186. As to sufficiency of affidavit of service of notice by mail, see Lowrie v. Salz, 75 Cal. 349, 17 Pac. 232; Pacific Mut. Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398; Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

103 Doll v. Smith, 32 Cal. 475.

104 Moore v. Besse, 35 Cal. 186.

105 Towdy v. Ellis, 22 Cal. 651. That form of acknowledgment of service of notice of appeal is held to be sufficient proof of service, see Lilienthal v. Caravita, 15 Or. 339, 15 Pac. 280.

106 Moffit v. McGrath, 25 Or. 478, 36 Pac. 578.

107 People v. Wallace, 23 Cal. 94.

108 Cal. Code Civ. Proc., § 940; Senter v. DeBernal, 38 Cal. 637; Franklin v. Reiner, 8 Cal. 340; Hildreth v. Gwinder, 10 Cal. 490.

109 Coffin v. Edgington, 2 Idaho, 627, 23 Pac. 80. See, also, Bellingham etc. Nat. Bank v. Central Hotel Co., 4 Wash. 642, 30 Pac. 671; Jones v. Sander, 2 Wash. 329, 26 Pac. 224; Traders' Bank v. Bokien, 5 Wash. 777, 32 Pac. 744; Millikin v. Houghton, 75 Cal. 539, 17 Pac. 641; Miller v.

to the appellant has made default does not preclude the necessity of serving such party with notice of appeal.[110] Service upon the opposite attorney is always sufficient,[111] and may be made by mail with its usual incidents, where otherwise admissible.[112] If a lawyer appears for himself and as attorney for his wife, service of notice of appeal upon him, directed to both, is a good service.[113] The notice need not be deposited in the post-office at any particular place, the only essentials being residence or offices in different places, and a regular mail communication between the place of mailing and the place of destination.[114] Service of papers upon the clerk of the court by mail is effective only from the date of his actually receiving them.[115] Where a board of supervisors appeals, the notice need not be given by the president of the board or district attorney; notice by the attorney of record is sufficient.[116] A copy of the notice of appeal filed must be served on the opposite party, before or at the time of filing the undertaking;[117] but it is premature, and the appeal will be dismissed, if it is served before entry of the judgment appealed from.[118] It cannot be filed and served after the undertaking is filed.[119] Where the notice has been filed and served after the undertaking is filed, a second appeal may be taken, if in time.[120] A second notice of appeal filed by the appellant pending the consideration of a motion to dismiss his first appeal, already

Richards, 83 Cal. 563, 23 Pac. 936; Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. 951.

110 Moody v. Miller, 24 Or. 179, 33 Pac. 402.

111 Coulter v. Stark, 7 Cal. 244. Service on attorney, as to sufficiency of, see Butler v. Smith, 20 Or. 126, 25 Pac. 381; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Wheeler v. Cragin, 25 Or. 602, 38 Pac. 308; Dillon v. Saloude, 68 Cal. 267, 9 Pac. 162; January v. Superior Court, 73 Cal. 537, 15 Pac. 108; Mantle v. Largey, 15 Mont. 116, 41 Pac. 1077; Walker v. Lewis, 10 Wash. 151, 38 Pac. 746.

112 Howard v. Shaw, 10 Wash. 151, 38 Pac. 746. As to service on clerk of party absent from state, see Silva v. Serpa, 86 Cal. 241, 24 Pac. 1013.

113 Dorlan v. Lewis, 7 How. Pr. 132; Crittenden v. Adams, 5 How. Pr. 310. As to sufficiency of service of the notice by mail, see Horr v. Aberdeen Packing Co., 7 Wash. 354, 35 Pac. 125; Pacific Mut. Life Ins. Co. v. Shepardson, 76 Cal. 376, 18 Pac. 398.

114 Luck v. Luck, 83 Cal. 574, 23 Pac. 1035; overruling Reed v. Allison, 61 Cal. 461; Murdock v. Clarke, 73 Cal. 25, 14 Pac. 385; Heinlen v. Heilbron, 94 Cal. 636, 30 Pac. 8.

115 Morris v. Morange, 26 How. Pr. 247, 17 Abb. Pr. 86.

116 Damrell v. Board of Supervisors, 40 Cal. 157.

117 Buffendeau v. Edmondson, 24 Cal. 94.

118 Bell v. Staacke, 137 Cal. 307, 70 Pac. 171.

119 Dooling v. Moore, 19 Cal. 81; Carpentier v. Williamson, 24 Cal. 609, 85 Am. Dec. 84.

120 Dooling v. Moore, 19 Cal. 81;

perfected, for failure to file a transcript within the required time, has no effect.[121] The supreme court obtains no jurisdiction of an appeal attempted after expiration of the time.[122]

§ 1758. **Service and filing of notice—Continued.**—Under the Washington statute,[123] requiring notice of appeal with proof of service to be filed with the clerk of the superior court within five days after the service thereof, it is not sufficient to serve a portion only of the respondents and file proof thereof within the statutory time, but service and filing should be made as to all the respondents.[124] Service of notice upon one of two persons, who appear in the suit as partners, is service upon the firm.[125] An absent partner not served with summons, and who did not appear in the action, is not an "adverse party" upon whom the notice of appeal must be served.[126] Notice of appeal from an order denying a motion for a new trial need only be served upon the parties to the motion in the court below.[127] So a notice of appeal from certain portions of an interlocutory decree in partition need only be served on those parties whose rights would be affected by a modification of the portions of the decree appealed from.[128] Service of a summons in error directed to the proper sheriff, made by a private person, is a nullity and of no avail,[129] but such summons may be served on the attorney of record in the original case.[130] Where an appellant, in ignorance of the death of the respondent, serves a notice of appeal on the attorney who had appeared for the latter, and the service is accepted by him, the appeal will not be dismissed on a motion

Columbet v. Pacheco, 46 Cal. 650. See, also, as to time of filing notice, Courtright v. Berkins, 2 Mont. 404; Baker v. Eyres, 6 Wash. 132, 32 Pac. 1073; Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758; Meuer v. Chicago etc. Ry. Co., 3 S. Dak. 322, 53 N. W. 187.

121 Reichenbach v. Lewis, 5 Wash. 577, 32 Pac. 460, 998.

122 In re Campbell's Estate, 141 Cal. 72, 74 Pac. 550; Best v. Rocky Mountain Nat. Bank, 31 Colo. 474, 73 Pac. 845; Richardson v. Ruddy, 10 Idaho, 151, 77 Pac. 972; Durand v. Higgins, 67 Kan. 110, 72 Pac. 567; In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093.

123 Laws 1893, p. 120, § 4.

124 Watson v. Pugh, 9 Wash. 665, 38 Pac. 163.

125 Shirley v. Birch, 16 Or. 1, 18 Pac. 344.

126 Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732.

127 Watson v. Sutro, 77 Cal. 609, 20 Pac. 88.

128 Miller v. Thomas, 71 Cal. 406, 12 Pac. 432. See Miller v. Rea, 71 Cal. 405, 12 Pac. 431; Roylance v. St. Louis Hotel Co., 74 Cal. 273, 20 Pac. 573.

129 Wellington v. Beck, 29 Colo. 73, 66 Pac. 881; Colo. (Mills') Annot. Stats., § 970.

130 Kan. Code Civ. Proc., § 544;

made by the attorney who accepted the service, on the ground that the service was void, because made after the death of the respondent.[131] The appellant will be liberal in granting amendments to the proof of service of the notice of appeal which can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits.[132] Notice must be served on each party whose interest will be affected by the appeal, whether he appears or is in default.[133] But in Oregon, since the amendments of 1899 and 1901, notice may be served on such adverse parties as have appeared in the action or suit, and it is not necessary to serve all the parties interested.[134] In appeal on a cost-bond suit, notice must be served on the sureties;[135] otherwise, if suit for costs is against plaintiff alone.[136] It is not necessary to serve an assignee of a judgment, though the assignment be on file.[137]

§ 1759. The same—Service on administrator after conviction for felony.—The conviction of an administrator of an estate of a deceased person for the crime of embezzlement does not render him *civiliter mortuus*, so as to prevent the service of a notice of appeal on him in an action in which he was sued as administrator and judgment rendered in his favor.[138] Notice of appeal should be served on all the parties who have appeared in the action, and who do not join in the notice; and if this is not done, the appeal will be dismissed.[139] Sureties on a cost-bond filed by a non-resident complainant, not being parties to the action, are not necessarily entitled to notice.[140]

§ 1760. Service on adverse parties.—Persons whose interest in the subject-matter is determined by the judgment appealed

Mechanics' Sav. Bank v. Harding, 65 Kan. 655, 70 Pac. 655.

131 Moyle v. Landers, 75 Cal. 595, 17 Pac. 698.

132 Perri v. Beaumont, 88 Cal. 108, 25 Pac. 1109.

133 Titiman v. Alamance Min. Co., 9 Idaho, 240, 74 Pac. 529.

134 In re Mendenhall's Will, 43 Or. 542, 72 Pac. 318, 73 Pac. 1033.

135 Pierce v. Commercial Inv. Co., 31 Wash. 655, 72 Pac. 473; Brockway v. Abbott, 34 Wash. 700, 74 Pac. 1069.

136 O'Connor v. Lighthizer, 34 Wash. 152, 75 Pac. 643.

137 Currans v. Seattle etc. Ry. & Nav. Co., 34 Wash. 512, 76 Pac. 87.

138 Brown v. Mann, 68 Cal. 517, 9 Pac. 549.

139 Davis v. Tacoma Ry. etc. Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; Willard v. Lucile Dreyfus Min. Co., 36 Wash. 229, 78 Pac. 917; Collins v. Kinnear, 37 Wash. 453, 79 Pac. 995.

140 Wagner v. Royal, 36 Wash. 428, 78 Pac. 1094.

from, and which interest will be injuriously affected by its reversal are adverse parties.[141] In an appeal made by the state from a decree of distribution, the rights of non-resident distributees cannot be determined on such appeal if they are not served with notice of the appeal.[142] The mortgagee is an adverse party in a suit for insurance, and must be served by the insurance company with notice of appeal, though such mortgagee has made no appearance.[143] Parties interested in maintaining the judgment for the purpose of enforcing contribution against the appealing defendants, in case they should be compelled to pay more than their share, are adverse parties, and should be served with notice of appeal.[144] Notice of appeal from an order granting a writ of assistance against a purchaser of foreclosed premises need not be served on all parties of the original foreclosure suit.[145] The appeal will not be dismissed for defect in the notice, if, from the notice and record, it appears that the adverse party has sufficient notice.[146] Verbal notice in open court may take the place of a written notice.[147]

§ 1761. **Service on co-parties.**—An executor who could not possibly be adversely affected, and who does not join in the appeal, need not be served with notice.[148] In Washington, a co-defendant must be dismissed,[149] unless all are joined in the appeal, and a bond given for all of them,[150] and this is so even though such defendant's answer admits the allegations of the plaintiff's complaint.[151] Where defendant secures judgment defeating the title of plaintiff, and also a third party, plaintiff on appeal must make such third party a defendant, and serve him with notice.[152] If co-defendants were adverse to the motion for

141 Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983; Cal. Code Civ. Proc., § 940; Nelson-Bennett Co. v. Twin Falls Land etc. Co., 13 Idaho, 767, 92 Pac. 980; Idaho Rev. Codes, § 4808; Bell v. San Francisco Sav. Union, 153 Cal. 64, 94 Pac. 225.

142 In re Pendergast's Estate, 143 Cal. 135, 76 Pac. 962.

143 Johnson v. Phœnix Ins. Co., 146 Cal. 571, 80 Pac. 719.

144 Stephens v. Stevens, 27 Utah, 261, 75 Pac. 619.

145 Mills v. Smiley, 9 Idaho, 317, 76 Pac. 783.

146 In re Murphy's Estate, 26 Wash. 222, 66 Pac. 424.

147 Brady v. Onfroy, 37 Wash. 482, 79 Pac. 1004.

148 Sprague v. Walton, 145 Cal. 228, 78 Pac. 645; Johnson v. Phœnix Ins. Co., 146 Cal. 571, 80 Pac. 719.

149 Wax v. Northern Pacific Ry. Co., 32 Wash. 210, 73 Pac. 380.

150 Ramsay v. Tacoma Land Co., 31 Wash. 351, 71 Pac. 1024.

151 First Nat. Bank v. Gordon etc. Co., 31 Wash. 682, 72 Pac. 464.

152 Kramer v. Marsh, 49 Or. 417, 90 Pac. 583.

new trial, they should be served as parties defendant on appeal.[153] One of joint defendants appealing must serve the other defendant, as an adverse party.[154]

§ 1762. Time for service.—Service made after sixty days will not effect an appeal.[155] And no jurisdiction on appeal is gained, if notice of the appeal is given prior to the entry of the judgment.[156] If notice of an appeal from an order denying a new trial is not filed within sixty days from date of the order, the appeal will be dismissed.[157] In Oklahoma and Kansas, one year is allowed in which to serve notice;[158] in Idaho, sixty days.[159] In Utah, the appeal may be taken any time within six months from the date of the entry of judgment.[160]

§ 1763. Mode of service.—A non-resident defaulting defendant may be served by depositing the notice in the post-office.[161] A notice of appeal, left in a conspicuous place on the desk of appellee's attorney during his absence, but after having called the attention of the person in charge of the office to the paper, is a proper service by "leaving with a person having charge" of the office.[162] Notice given in open court, at the time the decree is rendered, and entered in the journal as a part thereof is notice to all parties interested in the appeal.[163] But such a notice, in open court, on filing of the signed judgment entry a month after the denial of a motion for new trial, is insufficient.[164]

153 Niles v. Gonzalez, 152 Cal. 90, 92 Pac. 74.

154 Idaho Rev. Codes, § 4808; Doust v. Rocky Mountain Bell Tel Co., 14 Idaho, 677, 95 Pac. 209.

155 In re Turner's Estate, 139 Cal. 85, 72 Pac. 718; Gable v. Page, 6 Cal. App. 67, 91 Pac. 339.

156 In re More's Estate, 143 Cal. 493, 77 Pac. 407; Wood, Curtis & Co. v. Missouri Pacific Ry. Co., 152 Cal. 344, 92 Pac. 868.

157 Trelkeld v. O'Neal, 26 Mont. 209, 66 Pac. 940.

158 Buxton v. Alton-Dawson Mer. Co., 18 Okla. 287, 90 Pac. 19; Missouri etc. Ry. v. Murphy, 75 Kan. 707, 90 Pac. 290.

159 White v. Whitcomb, 13 Idaho, 490, 90 Pac. 1080.

160 Everett v. Jones, 32 Utah, 489, 91 Pac. 360.

161 Titiman v. Alamance Min. Co. 9 Idaho, 240, 74 Pac. 529.

162 Cal. Code Civ. Proc., § 1011; Fogg v. Perris Irr. Dist. 142 Cal. xviii, 76 Pac. 1127; People v. Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

163 In re Crawford's Estate, 51 Or. 776, 90 Pac. 147. See, also, Crawford's Estate v. Crawford (Or.), 93 Pac. 820; Carlson v. Curren, 48 Wash. 249, 93 Pac. 315.

164 Chilcott v. Globe Nav. Co., 49 Wash. 302, 95 Pac. 264.

§ 1764. Proof of service.—An affidavit of service by mail which does not show that either the respondent or his attorney resided or had an office at the place to which the notice was addressed is insufficient. Such an affidavit must be made by the one making the service or by one having personal knowledge of the facts constituting such service.[165] If the successful party has no counsel of record, service of the notice on such party by mailing a copy to his post-office address is sufficient.[166] Where attorneys represent two parties in the court below, whose interests are not in conflict, and one of them appeals, the fact that they represent the appellant on the appeal does not show that they are without authority to acknowledge service on themselves, as attorneys for the other party, of the notice of appeal.[167]

§ 1765. Filing of notice.—The notice may be filed at any time after it is served, and within the time for taking an appeal —within six months.[168] The filing of notice of appeal being necessary to take, and not to perfect, an appeal, the court cannot permit the performance of such an act after the statutory time has elapsed.[169] If the notice is not served on the parties necessary to be served within the time allowed by law, the fact that service is made on parties not necessary to be served is of no avail.[170]

§ 1766. The same—Neglect of clerk to make journal entry.—Where written notice of appeal is served and filed within the proper time, the appeal will not be defeated by the failure of the clerk to enter the notice in the journal of the court below.[171] The supreme court not having been asked to redocket the cause on error, it is too late, when the cause comes up again from judgment of the district court, entered in pursuance of the mandate of the appellate court, to assert that it should have been redocketed.[172]

165 Selfridge v. Paxton, 135 Cal. 281, 67 Pac. 138.

166 Hayes v. Union Mer. Co., 27 Mont. 264, 70 Pac. 975.

167 Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786, 196 U. S. 93, 49 L. Ed. 400, 25 Sup. Ct. 216.

168 San Francisco Law etc. Co. v. State, 141 Cal. 354, 74 Pac. 1047; Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876.

169 Taylor v. Lapham, 41 Or. 479, 69 Pac. 439.

170 Collins v. Kinnear, 37 Wash. 453, 79 Pac. 995.

171 Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868; People v. District Court, 33 Colo. 416, 80 Pac. 1069.

172 Taylor v. Colorado Iron Works, 33 Colo. 179, 80 Pac. 129.

§ 1766a. **The same—Waiver of irregularity.**—Where the appellate court has jurisdiction of the subject-matter, a voluntary appearance by the respondent, and taking steps in the cause in the appellate court, is a waiver of a mere irregularity in the service of the notice of appeal.[173]

§ 1767. **Sufficiency of notice.**—A notice of appeal from a judgment, and from all orders made in the cause, is only an appeal from a judgment. It does not sufficiently describe any order.[174] Even when an appeal is taken from a judgment, orders necessarily affecting it must also be appealed from in form.[175] Notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescriptions.[176] But this rule does not extend to sustaining a notice of appeal as an appeal from a judgment, when it does not state that the appeal is taken from a judgment.[177] A notice which gives the name of the court and of the parties to the action, the date of the judgment, without any other description, and informs or makes known to the respondent that the appellant appeals from the judgment in said action, is held sufficient.[178] An immaterial mistake or omission will not invalidate the notice, if sufficient in other respects.[179] A notice of appeal describing the order appealed from as one made and entered on a certain day is a sufficient designation of the subject-matter of the appeal when no other order was entered on the day specified.[180] A notice which states that the appeal is taken "from all orders of the district court made and entered

173 Holden v. Haserodt, 2 S. Dak. 220, 49 N. W. 97; Cleveland etc. R. R. Co. v. Mara, 26 Ohio St. 185; Hohmann v. Eiterman, 83 Ill. 92.

174 Gates v. Walker, 35 Cal. 289.

175 Fry v. Bennett, 16 How. Pr. 385; Marqueart v. LaFarge, 5 Duer, 559.

176 Meley v. Boulon, 104 Cal. 262, 37 Pac. 931.

177 Id. See Christian v. Evans, 5 Or. 253; Luse v. Luse, 9 Or. 149.

178 Ream v. Howard, 19 Or. 491, 24 Pac. 913.

179 See Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Weyl v. Sonoma Val. R. R. Co., 69 Cal. 202, 10 Pac. 510; Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73; Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357; Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780; McConnell v. Kaufman, 4 Wash. 229, 29 Pac. 1053.

180 Gruell v. Spooner, 71 Cal. 493. As to matter in notice treated as surplusage, see Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187; Nevada Cent. R. R. Co. v. District Court, 21 Nev. 409, 32 Pac. 673; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103.

in the action" is insufficient.[181] A notice appealing from all orders made by a probate court in the case, on a certain day, is sufficient.[182] A notice of appeal addressed to certain parties by name is no notice to other parties, although the attorney acting for all the parties admitted service.[183] Oral notice given in open court at the time judgment is rendered, and entered of record, is notice to all parties.[184] A stipulation to consolidate two causes and use the pleadings of one, both cases being determined by the results of one, is an appearance rendering notice unnecessary.[185] A notice of appeal in the name of the original parties to the action is sufficient where it is shown that other parties were brought in by cross-complaint of defendant.[186] Only one notice is necessary, though a separate judgment is entered in favor of each defendant, there being, so far as plaintiff is concerned, only one final judgment.[187] A notice of intention to appeal all parts of the principal case proper is a sufficient notice of intention to appeal the whole case.[188] In forcible entry and detainer, a notice is not invalidated because it contains a clause that the "appeal is taken on questions of law alone."[189] If the record shows that the notice was not served in time, no appeal is pending, and a motion to dismiss will be denied.[190] If the notice is signed by an attorney of the court, the presumption is that he had authority to take such action.[191]

§ 1768. **The same—Continued.**—Where an appellant has two attorneys of record in the lower court, or a firm of attorneys, either one of the two, or any member of the firm, may sign the notice of appeal.[192] The notice is not ineffectual because the attorney signing it has not been admitted to practice in the appellate court, provided he is qualified to act as the attorney of record in the court below.[193] Under the Oregon practice, a notice of ap-

181 Genella v. Relyea, 32 Cal. 159.
182 Estate of Pacheco, 29 Cal. 224.
183 In re Pendergast's Estate, 143 Cal. 135, 76 Pac. 962.
184 In re Crawford's Estate, 51 Or. 776, 90 Pac. 147.
185 Valley Lumber Co. v. Struck, 146 Cal. 266, 80 Pac. 405.
186 Idaho Comstock Min. Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975.
187 Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736.
188 Branch v. Diek, 14 Ohio St. 551.
189 Zoller v. McDonald, 23 Cal. 136.
190 Harlan v. Pratt, 50 Cal. 94.
191 Ricketson v. Compton, 23 Cal. 636.
192 Cockrill v. Hall, 76 Cal. 192, 18 Pac. 318.
193 Beardsley v. Frame, 73 Cal. 634, 15 Pac. 310.

peal is sufficient, although signed by attorneys who were not the attorneys of the appellant in the court below, and no substitution has been made as the statute provides.[194] Notice given by an attorney authorized to act is sufficient, though such is not the attorney of record, if the change is made after final judgment.[195] Under the Washington statute,[196] notice of appeal given orally in open court is sufficient. And where such notice is given and entered, the presumption is that the proper order was given to the clerk, although the record may not state so.[197] But notice of appeal given orally in open court must be given at the time of rendition of judgment, in order to be effective.[198] If then so given, no other service of notice is necessary.[199] And it is held that notice of appeal in open court within the time allowed by law, but at a term of court subsequent to the term when judgment was rendered, is sufficient, though appellees were not present, nor had notice been served on them to appear.[200]

§ 1769. Stipulations, effect of.—A stipulation that no execution shall issue until the determination of the appeal is not a waiver of an objection that the notice of appeal was not filed in season.[201] If the attorneys of the parties stipulate in the transcript that notice was filed in the court below and served, the supreme court cannot receive evidence contradicting the stipulation.[202] An intervener in a foreclosure suit, having entered into a stipulation which precluded him from being heard until the practical determination of the issues of the case and the sale of the mortgaged property, has no such standing in the case as requires him to be made a party to the appeal under the Oregon statute.[203] The court below, upon proper application, can relieve a party from a mistake of fact in such cases, but the supreme court cannot.[204] Where the object of a notice of appeal is accomplished, it is immaterial whether the notice of appeal is

194 Shirley v. Birch, 16 Or. 1, 18 Pac. 344.

195 Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

196 Ballinger's Codes, § 6503.

197 Town of Elma v. Carney, 4 Wash. 418, 30 Pac. 732.

198 Cusick v. Beyers, 5 Wash. 98, 31 Pac. 422.

199 Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Seattle v. Liberman, 9 Wash. 276, 37 Pac. 433.

200 McMillan v. Mau, 1 Wash. 26, 23 Pac. 441.

201 Moulton v. Ellmaker, 30 Cal. 527.

202 Bonds v. Hickman, 29 Cal. 460.

203 Shirley v. Birch, 16 Or. 1, 18 Pac. 344.

204 Bonds v. Hickman, 29 Cal. 460.

given or not.[205] Where both parties appear, no notice whatever is necessary to be shown.[206] An admission of due service waives all objections, even that of notice not having been given in due time.[207]

§ 1770. **Contents of notice.**—The notice shall contain a statement of the judgment or order, or the specific part thereof, appealed from.[208] It need not state the grounds of appeal, nor the objections raised,[209] though it has been said it would be better practice to do so.[210] If there is enough in the notice to show that the judgment or order contained in the transcript is the same intended to be appealed from, it will not be dismissed, although it may contain mistakes as to the dates of the order or judgment.[211] A notice stating that defendant appealed from the whole judgment is sufficient notice within the statute.[212] If necessary to direct the notice to any one, the prevailing parties only are sufficient;[213] and it is not necessary to set out the names of all of the prevailing parties, if the abbreviation "et al." is used.[214] While there is no such thing as an "application to appeal," yet the use of such term in the notice is not a fatal defect;[215] also, the term "has appealed" may be used for "does appeal."[216] When two separate notices of appeal from different orders are included in one paper, one of which is not appealable, the other appeal may be prosecuted. It gives sufficient notice of each appeal if respondents understand therefrom, that appellants intend to prosecute two appeals.[217] A judgment actually rendered on the twentieth day of March, but entered on the twenty-first, is sufficiently designated by reference to the judgment of March twentieth, there being no other judgments between the same parties.[218] The place of assignment of error is in the

205 McLeran v. Shartzer, 5 Cal. 70, 63 Am. Dec. 84.

206 Id.; doubted in Killip v. Empire Mill etc. Co., 2 Nev. 44.

207 Struver v. Ocean Ins. Co., 2 Hilt. 475.

208 Cal. Code Civ. Proc., § 940.

209 Wilson v. Allen, 3 How. Pr. 369.

210 Smith v. Grant, 17 How. Pr. 381.

211 Flateau v. Lubeck, 24 Cal. 364.

212 Price v. Van Caneghan, 5 Cal. 124; Wilson v. Allen, 3 How. Pr. 372; People v. Tarbell, 17 How. Pr. 120.

213 Smalley v. Langenour, 30 Wash. 307, 70 Pac. 786.

214 Philadelphia Mortgage etc. Co. v. Palmer, 32 Wash. 455, 73 Pac. 501.

215 Brown v. Calloway, 34 Wash. 175, 75 Pac. 630.

216 James v. James, 35 Wash. 655, 77 Pac. 1082.

217 McGinnis v. Boston & M. Consol. etc. Co., 29 Mont. 428, 75 Pac. 89.

218 O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 692.

statement, and not in the notice of appeal.[219] Under the Oregon practice, the general rule is that the notice of appeal in actions at law must specify with reasonable certainty the grounds of error upon which the appellant intends to rely.[220]

§ 1771. Undertaking—Amendments.—The omission of the words "to pay to" will not invalidate an appeal-bond on appeal from a justice's court. Were it otherwise, the court should have given leave to file a new bond.[221] The court has power to allow an amendment to an undertaking, as to technical facts.[222] Defects in justification may, by leave of court, be similarly obviated.[223] Or such defects may be supplied by allowing the filing and service of a new undertaking, *nunc pro tunc*.[224] The supreme court can and will, in case of accident or mistake, allow the appellant to substitute a sufficient undertaking for a defective one, even after the five days.[225] Where an appellant in good faith attempts to comply with an order to file an amended appeal-bond, the court in its discretion may enter another order allowing a second amended bond.[226] But where the defect in justification was of an essential, and not of a technical, nature, the application for amendments was denied.[227] A new undertaking cannot, after time, be filed as a substitute for a defective one.[228] An undertaking cannot be amended in substance, varying the liability of the sureties without their consent.[229] A bond signed by only the individuals against whom judgment was rendered, and who

219 Burnett v. Pacheco, 27 Cal. 409.

220 Carver v. Jackson County, 22 Or. 62, 29 Pac. 77; Thompson v. New York Life Ins. Co., 21 Or. 466, 28 Pac. 628; Bridal Veil Lumber Co. v. Johnson, 25 Or. 105, 34 Pac. 1026; Krewson v. Purdom, 13 Or. 563, 11 Pac. 281.

221 Billings v. Roadhouse, 5 Cal. 71. See, also, Howard v. Harman, 5 Cal. 78; Coulter v. Stark, 7 Cal. 244; Cunningham v. Hopkins, 8 Cal. 34; Frankel v. Stern, 44 Cal. 168.

222 Marvin v. Marvin, 11 Abb. Pr. (N. S.) 97; Beach v. Southworth, 6 Barb. 173; People v. Tarbell, 17 How. Pr. 120.

223 Hees v. Snell, 8 How. Pr. 185.

224 Mills v. Thursby (No. 8), 11 How. Pr. 129; Tiers v. Carnahan, 3 Abb. Pr. 69; Kissam v. Marshall, 10 Abb. Pr. 424; Sternhaus v. Schmidt, 5 Abb. Pr. 66.

225 Rabe v. Hamilton, 15 Cal. 32. But see Shaw v. Randall, 18 Cal. 386.

226 McKee v. Bassick Min. Co., 8 Colo. 392, 8 Pac. 561.

227 New York Cent. Ins. Co. v. National Protec. Ins. Co., 10 How. Pr. 344; Cushman v. Martine, 13 How. Pr. 402.

228 Commercial Bank v. Wells, 5 Cal. App. 473, 90 Pac. 981.

229 Langley v. Warner, 1 N. Y. 606, 3 How. Pr. 363; Cobb v. Lackey, 6 Duer, 649. See N. Y. Code Civ. Proc., 1877, § 730.

appealed, is insufficient, because the bond is intended to afford additional security.[230]

§ 1772. Amount.—The only undertaking required to perfect an appeal is one for the payment of all costs and damages which may be awarded against the appellant, not exceeding three hundred dollars. A deposit of that sum with the clerk of the court in which the judgment or order appealed from was entered fulfills the purpose of the undertaking.[231] But to stay execution of a judgment or order directing the payment of money, the undertaking must be in double the amount named in the judgment or order.[232] A bond for seven hundred dollars, on appeal from a judgment for two hundred and ninety-four dollars, is not sufficient to serve as an appeal and a stay-bond on appeal, where the appeal-bond must be two hundred dollars and the stay-bond double the judgment.[233] The amount due on the judgment appealed from must be distinctly stated in the undertaking, to form a groundwork for the necessary affidavit of justification.[234] An undertaking on appeal is not invalidated because the sum mentioned exceeds three hundred dollars.[235] If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the undertaking shall be for such amount as the court, or the judge thereof, or the county judge, may direct.[236] And it may be for sufficient to provide for the deterioration of the property.[237] Where the court neglects to fix the amount of the appeal-bond, appellant may give bond in a sufficient amount.[238] If the judgment or order direct the execution of a conveyance or other instrument, the appeal will not operate as a stay, unless the instrument is executed or de-

230 David v. Gulch, 30 Wash. 266, 70 Pac. 497.

231 Cal. Code Civ. Proc., § 941. See Duncan v. Times-Mirror Co., 109 Cal. 602, 42 Pac. 147.

232 Cal. Code Civ. Proc., § 942. See Boob v. Hall, 105 Cal. 413, 38 Pac. 977; Dufty v. Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323; Peirson v. Peirce, 37 Wash. 443, 79 Pac. 1003; State v. Superior Court, 30 Wash. 232, 70 Pac. 484; Young v. Borzone, 26 Wash. 4, 66 Pac. 135; Title Guarantee etc. Co. v. McDonnell, 28 Wash. 359, 68 Pac. 890; Graham v. American Surety Co., 28 Wash. 735, 69 Pac. 365.

233 Winchester v. Morris, 33 Wash. 706, 74 Pac. 361.

234 Harris v. Bennett, 1 Code Rep. (N. S.) 203.

235 Zoller v. McDonald, 23 Cal. 136; In re Estabrooks, 5 Cow. 27.

236 Cal. Code Civ. Proc., § 943.

237 Read v. Potter, 11 Abb. Pr. 413.

238 Hubble v. Renick, 1 Ohio St. 171.

posited with the clerk to abide the judgment of the appellate court.[239]

§ 1773. **Consideration.**—The stay of proceedings accorded by the statute to the execution of the undertaking is a sufficient consideration.[240] Where the undertaking is pursuant to statute, it need express no consideration on its face.[241] But an undertaking not pursuant to statute, expressing no consideration, and not under seal, is void.[242]

§ 1774. **Deposit in court.**—In all cases, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.[243]

§ 1775. **Delivery.**—The execution of the paper, delivery to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is, *prima facie*, as sufficient proof of delivery, if delivery is essential, as if the undertaking were sealed.[244] An undertaking filed after time is too late, notwithstanding personal service of the notice.[245]

§ 1776. **Exception to sureties.**—The adverse party may except to the sufficiency of the sureties within thirty days after filing, and the opposite party has twenty days thereafter to get other sureties, or have the same justified before the judge before whom the cause was tried or before the county clerk.[246] Failure of the sureties to justify when excepted to is no ground for dismissing the appeal, but only affects the stay of execution.[247] Where the appellant gave notice of the justification on a certain day, during certain hours of the day, respondent has till the last hour specified in which to appear and except.[248] The objection that an undertaking to stay proceedings is insufficient may be

239 Cal. Code Civ. Proc., § 944.

240 Dore v. Covey, 13 Cal. 502.

241 Thompson v. Blanchard, 3 N. Y. 335; Seacord v. Morgan, 17 How. Pr. 394. See Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070.

242 Robert v. Donnell, 10 Abb. Pr. 454.

243 Cal. Code Civ. Proc., § 948.

244 Dore v. Covey, 13 Cal. 502.

245 Rose v. Mesmer, 134 Cal. 459, 66 Pac. 594.

246 Cal. Code Civ. Proc., § 948.

247 Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

248 Lower v. Knox, 10 Cal. 480.

waived.[249] So failing to attend at the time and place of justification waives his objection, although the sureties also fail to attend.[250]

§ 1777. **Filing undertaking.**—Such undertaking shall be filed, or such deposit made, with the clerk, within five days after the notice of appeal is filed;[251] and the California courts formerly had no power to extend the time;[252] but trial courts do have the power now;[253] while the appellate court in the state of Idaho does not.[254] A failure to comply with the statute will be fatal.[255] After the time for filing an undertaking has expired, the appellant cannot withdraw the deposit previously made, and, in lieu thereof, file an undertaking.[256] Under section 1054 of the Code of Civil Procedure, the time may be extended by the trial court, or the judge thereof, not exceeding thirty days.[257] The fact that an appeal-bond is filed before the ruling of the court is made upon a motion for a new trial does not vitiate the appeal, if the notice is not given and filed until after the motion has been overruled.[258] Appellant finding the clerk's office closed, after office-hours on the last day for effecting an appeal, hunted up one of the deputy clerks, who marked the undertaking on appeal filed, and thereafter, the next day, made the proper entry thereof in the records. But this is not a filing in time so as to perfect the appeal.[259]

§ 1778. **The same—Service by mail.**—When service of notice of appeal is by mail, it is complete at the time of the deposit of a copy in the post-office, and the undertaking on appeal must be

249 Halsey v. Flint, 15 Abb. Pr. 368. And see Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

250 Ballard v. Ballard, 18 N. Y. 491.

251 Cal. Code Civ. Proc., § 940; Merced Min. Co. v. Fremont, 7 Cal. 132; Lambert v. Moore, 1 Nev. 344; Peran v. Monroe, 1 Nev. 484; Stratton v. Graham, 68 Cal. 168, 8 Pac. 710.

252 Elliott v. Chapman, 15 Cal. 383. Affirmed in Shaw v. Randall, 15 Cal. 384.

253 Schloesser v. Owen, 134 Cal. 546, 66 Pac. 726; Wadsworth v. Wadsworth, 74 Cal. 104.

254 West v. Dygert, 13 Idaho, 641, 92 Pac. 753.

255 Gordon v. Wansey, 19 Cal. 82; Bellegarde v. San Francisco Bridge Co., 80 Cal. 61, 22 Pac. 57; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411. So, in Utah. Cook v. Oregon etc. Ry. Co., 7 Utah, 416, 27 Pac. 5. Also, in Washington: Savage v. Graham, 14 Wash. 323, 44 Pac. 540.

256 Mullen v. Hunt, 67 Cal. 69, 7 Pac. 121; Wiebold v. Bauer, 95 Cal. 418, 30 Pac. 558.

257 Wadsworth v. Wadsworth, 74 Cal. 104, 15 Pac. 447.

258 Wores v. Preston, 4 Ariz. 92, 77 Pac. 617.

259 Hoyt v. Stark, 134 Cal. 178, 86 Am. St. Rep. 246, 66 Pac. 223.

filed within five days after such deposit.[260] When the last day for filing the undertaking falls on Sunday, an undertaking filed on the day following is in time.[261] The fact that appellee is served by mail does not extend appellant's time. An appeal-bond must be filed within five days from service of the notice, and not five days from the time of filing the notice.[262] The provisions of a statute in regard to the time within which an act is to be done must not be construed as directory where a consequence is attached to a failure to comply.[263] The undertaking cannot be filed before the notice of appeal is filed and served.[264] Under the Washington appeal act of 1893, an appeal-bond may be filed before the date of the taking of the appeal.[265] The time of filing the undertaking relates back to the time of filing and service of notice of appeal.[266] Parties intending to take advantage of the failure to file the requisite undertaking must do so before the case is submitted.[267]

§ 1779. **Filing new undertaking.**—Where, on appearance of parties for justification, under an exception to the sureties, a new undertaking is filed in the place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after the notice of appeal.[268] No appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal.[269] If a stay-bond becomes insuffi-

260 Brown v. Green, 65 Cal. 221, 3 Pac. 811.

261 Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522. See, also, as to time of filing undertaking, Brown v. Hanley, 3 Idaho, 219, 28 Pac. 425; Pardee v. Murray, 4 Mont. 35, 1 Pac. 737; Northern etc. T. Co. v. Lowenberg, 11 Or. 286, 3 Pac. 683; Odell v. Godfrey, 13 Or. 469, 11 Pac. 190.

262 Johnson County Sav. Bank v. Klaffki, 26 Mont. 384, 68 Pac. 410.

263 Shaw v. Randall, 15 Cal. 384. See Pierce v. Manning, 1 S. Dak. 306, 47 N. W. 295.

264 Dooling v. Moore, 19 Cal. 81; Carpentier v. Williamson, 24 Cal. 609, 85 Am. Dec. 84; Little v. Jacks, 68 Cal. 343, 8 Pac. 856, 9 Pac. 264, 11 Pac. 128.

265 Debenture Co. v. Warren, 9 Wash. 312, 37 Pac. 451. See Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868; Runyan v. Russell, 3 Wash. 665, 29 Pac. 348; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133.

266 Peran v. Monroe, 1 Nev. 484; Rogers v. Trumbull, 32 Wash. 211, 73 Pac. 381.

267 Cook v. Klink, 8 Cal. 352; Bryan v. Berry, 8 Cal. 130.

268 Cummins v. Scott, 23 Cal. 526.

269 Cal. Code Civ. Proc., § 954; Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241. See, also, Coulter v. Stark, 7 Cal. 244; Cun-

cient, and a new one is not given, execution may be issued on the judgment, but it is not sufficient to call for a dismissal of the appeal.[270] In such case, on filing a new undertaking in the supreme court, approved by one of the justices, the respondent cannot require the sureties on the new undertaking to justify.[271] But after the time for filing an appeal-bond has expired, a new undertaking cannot be filed as a substitute for a defective one.[272] Appeals taken from two distinct orders are each ineffectual, and will be dismissed when only one undertaking on appeal is filed which fails to designate to which of the appeals it was intended to apply, and in such case the appellant is not authorized to file new undertakings.[273]

§ 1780. **Form.**—The undertaking may be in one instrument or several, at the option of the appellant.[274] If two notices and two undertakings are filed, both in time, as extended by a series of holidays and statute, it constitutes but one appeal, and the particular notice need not be specified in the undertakings.[275] It is not necessary that an appeal-bond conform in all respects to the form prescribed by statute.[276] Non-compliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking.[277] A non-compliance with essentials may invalidate an undertaking.[278] The omission of the words "to pay to" will not invalidate the obligation; if it did, leave should be granted to file a good bond.[279] An undertaking given in the form of a penal bond, providing it substantially conform to all the conditions above imposed, is

ningham v. Hopkins, 8 Cal. 34; Sternhaus v. Schmidt, 5 Abb. Pr. 66; Deen v. Hemphill, Hempst. 154, Fed. Cas. No. 3736a.

270 Mersfelder v. Spring, 136 Cal. 619, 69 Pac. 251.

271 Stevenson v. Steinberg, 32 Cal. 373. As to filing of new undertaking, see Towle v. Bradley, 2 S. Dak. 472, 50 N. W. 1057; Williams v. Williams, 19 Colo. 19, 34 Pac. 285; Butler v. Ashworth, 100 Cal. 334, 34 Pac. 780; Payne v. Davis, 2 Mont. 381; De Lashmutt v. Sellwood, 10 Or. 51; Woodman v. Calkins, 12 Mont. 456, 31 Pac. 63.

272 Commercial Bank of Santa Ana v. Wells, 5 Cal. App. 473, 90 Pac. 981.

273 Home etc. Associates v. Wilkins, 71 Cal. 626, 12 Pac. 799; Commercial Bank v. Wells, 5 Cal. App. 473, 90 Pac. 981.

274 Cal. Code Civ. Proc., § 947; Englund v. Lewis, 25 Cal. 355; Lacan v. Dutch Miller Min. Co., 31 Wash. 566, 72 Pac. 112.

275 In re Sutro's Estate, 152 Cal. 249, 92 Pac. 486, 1027.

276 Foster v. Foster, 7 Paige, 48.

277 Dore v. Covey, 13 Cal. 502.

278 Chemung Canal Bank v. Judson, 10 How. Pr. 133.

279 Billings v. Roadhouse, 5 Cal. 71.

good.[280] Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll opposite the name of one of the two signers who contemporaneously verify the instrument as their bond, it is the bond of both.[281] The names and residence of the sureties need not appear in the body of the paper.[282] Residence of sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions.[283] Where an instrument with sufficient sureties and properly conditioned has been given as an appeal-bond, but instead of being in the form of a bond is in the form of an undertaking, it will, under the statute requiring courts to look at substance rather than form, be upheld as sufficient.[284]

§ 1781. Form and sufficiency. — A fatally defective undertaking is not curable, under section 954 of the California Code of Civil Procedure.[285] Where there are two orders, but the substance of one is contained in the other, so that two orders were not necessary, only one appeal and one bond are necessary.[286] If an appeal be taken from two separate orders, two separate securities must be given.[287] One undertaking in the sum of three hundred dollars is sufficient to confer jurisdiction of an appeal from both the judgment and order denying a new trial.[288] But where a judgment is single, only one undertaking will be requisite, though it directs the payment of different sums to different defendants.[289] If the respondents have a distinct interest in the decree, a bond should be given to each; but if their interests be joint, one bond is sufficient.[290] If an instrument executed and deposited with the clerk, as required by section 944 of the California Code of Civil Procedure,[291] be lost or destroyed pending the appeal, the appellant, if unsuccessful,

280 Conklin v. Dutcher, 5 How. Pr. 386.

281 Canfield v. Bates, 13 Cal. 606.

282 Dore v. Covey, 13 Cal. 502. See Brown v. Jessup, 19 Or. 288, 24 Pac. 232. That they are usually stated, see Beach v. Southworth, 6 Barb. 173; Blood v. Wilder, 6 How. Pr. 446.

283 Dobbins v. Dollarhide, 15 Cal. 375; Dore v. Covey, 13 Cal. 502.

284 Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733.

285 Little v. Thatcher, 151 Cal. 558, 91 Pac. 321.

286 Gregory v. Dodge, 3 Paige, 90.

287 Schermerhorn v. Anderson, 1 N. Y. 430.

288 Buckner v. Malloy, 152 Cal. 484, 92 Pac. 1029.

289 Smith v. Lynes, 2 N. Y. 569, 4 How. Pr. 209; In re Sutro's Estate, 152 Cal. 249, 92 Pac. 486, 1027.

290 Thompson v. Ellsworth, 1 Barb. Ch. 624.

291 N. Y. Code Civ. Proc., § 337.

will be bound to execute another.[292] After an appeal which is a nullity, the party may, if the time has not expired, disregard such appeal and prosecute another.[293] "That the appellant will pay all costs and damages which may be awarded against him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars," is a sufficient undertaking under this section.[294] An order quashing an execution is not a final judgment for the recovery of money, and the court may fix the bond in a sum less than double the amount of the judgment.[295] A bond running "to the respondent, if living, and if not living, then to his executors," is not a bond to the adverse party, and will not sustain an appeal.[296] An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite.[297] Where a bond was executed by a surety, and rejected by the justice, and afterwards, without the knowledge of the obligor, the name of another was interlined as an obligor, who executed the bond, it was held that it was void as to the first obligor.[298]

§ 1782. The same—Continued.—Where there are several appeals in the same transcript, it is the general rule that there should be an undertaking on appeal for each order or judgment appealed from, and each appeal should be cited in the undertaking.[299] If but one undertaking is filed on distinct appeals, without special reference to either matter appealed from, it is void, and the appellant is not authorized to file a new undertaking so as to preclude dismissal.[300] If a single undertaking

292 Worrall v. Munn, 17 N. Y. 475.

293 Kelsey v. Campbell, 38 Barb. 238; Kirby v. Collins, 5 Wash. 682, 32 Pac. 769.

294 Zoller v. McDonald, 23 Cal. 136.

295 State v. Superior Court, 32 Wash. 693, 73 Pac. 779.

296 Hill v. Herrick, 3 Ariz. 313, 73 Pac. 399; Downing v. Rademacher, 136 Cal. 673, 69 Pac. 415.

297 Curtis v. Richards, 9 Cal. 33; Tissot v. Darling, 9 Cal. 278; Mont. Rev. Codes, §§ 7100, 7101; Russell v. Chicago etc. Ry., 37 Mont. 1, 94 Pac. 488, 501.

298 O'Neale v. Long, 4 Cranch, 60, 2 L. Ed. 550. See Martin v. Thomas, 24 How. 315, 16 L. Ed. 689.

299 Webb v. Trescony, 76 Cal. 621, 18 Pac. 796. See, also, to same effect, Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Sharon v. Sharon, 68 Cal. 326, 9 Pac. 187; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Corcoran v. Desmond, 71 Cal. 100, 11 Pac. 815; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650.

300 Home etc. Assoc. v. Wilkins, 71 Cal. 626, 12 Pac. 799; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; Commercial Bank v. Wells, 5 Cal. App. 473, 90 Pac. 981.

is given, and refers to only one of the orders appealed from, or to the judgment alone, the appellate court will have jurisdiction of only the matter so referred to in the undertaking, and the other appeals will be dismissed.[301] One undertaking on appeal is, however, sufficient, where there is in the same notice and transcript an appeal from a judgment with an appeal from an order denying a new trial, and the undertaking is in terms applicable to both appeals.[302] But an undertaking in such case which recites that it is given "on such appeal" is void for uncertainty, and both appeals will be dismissed.[303] An undertaking on appeal is sufficient, although incorrectly reciting the date of the order appealed from, if there is but one order and one appeal, and the undertaking in all other respects correctly describes them.[304] On an appeal from a judgment awarding an injunction and for costs and damages, an undertaking in the form of and purporting to be an undertaking to stay execution, will not be considered as the undertaking on appeal required by the California statute.[305]

Under the Washington practice, a *supersedeas* bond on appeal is sufficient without the giving of an appeal-bond.[306] In Washington an appeal-bond conditioned upon payment of all costs and damages that may be awarded upon appeal and to satisfy any judgment, etc., is insufficient to maintain the appeal, as it contains the conditions for both an appeal- and a stay-bond,[307] but if a

301 Crew v. Diller, 86 Cal. 554, 26 Pac. 66; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Wood v. Pendola, 77 Cal. 82, 19 Pac. 183; Sebree v. Smith, 2 Idaho, 357, 16 Pac. 477. See Edgecomb v. His Creditors, 19 Nev. 149, 7 Pac. 553.

302 Williams v. Dennison, 86 Cal. 430, 25 Pac. 244; Centerville etc. Co. v. Bachtold, 109 Cal. 111, 41 Pac. 813; Chester v. Bakersfield etc. Assoc., 64 Cal. 42, 27 Pac. 1104; Webb v. Treacony, 76 Cal. 621, 18 Pac. 796; Watkins v. Morris, 14 Mont. 354, 36 Pac. 452. See Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407.

303 Motherwell v. Taylor, 2 Idaho, 148, 9 Pac. 417; Eddy v. Van Ness, 2 Idaho, 101, 6 Pac. 115. See Farni v. Yoell, 95 Cal. 442, 30 Pac. 578.

304 Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284. So where there is a mistaken indorsement of the title of the case in which the undertaking is given. Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

305 Duffy v. Greenebaum, 72 Cal. 157, 12 Pac. 74, 13 Pac. 323.

306 State v. Seavey, 7 Wash. 562, 35 Pac. 389; Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009. For instance of insufficient undertaking on appeal, see Frevert v. Swift, 19 Nev. 400, 13 Pac. 6.

307 Hewitt v. Lansdale, 26 Wash. 615, 67 Pac. 354.

bond on appeal purports to be both an appeal- and a stay-bond, and is in a sufficient amount, it is sufficient to contain the stay-bond conditions without those of an appeal-bond.[308]

§ 1783. **Justification of sureties.**—The adverse party may except to the sufficiency of the sureties at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed.[309] The failure of the sureties to justify when excepted to is no ground for dismissing the appeal, but only affects the stay of execution.[310] The time has been held to run from the filing of the undertaking, and not from the service of copy of undertaking and notice of appeal.[311] If the sureties, after notice, fail to appear and justify, the bond becomes void, and the appeal ineffectual.[312] One of the obligees may sign the bond, if there are sufficient other sureties.[313] Where, after notice of exception, the time for justification is extended, the failure of the sureties to justify within five days after notice of exception renders the appeal a nullity; the statute upon this is peremptory, and the court has no power to extend the time.[314] And it is error in the judge to make an order of *supersedeas* staying the execution.[315] And where the judgment is for more than three thousand dollars, several persons may act as sureties, and justify severally in the amount specified in the undertaking as that for which each becomes responsible.[316]

308 King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

309 Cal. Code Civ. Proc., § 948. See Boyer v. Superior Court, 110 Cal. 401, 42 Pac. 892; Bank of Escondido v. Superior Court, 106 Cal. 43, 39 Pac. 211.

310 Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160.

311 Webster v. Stevens, 3 Abb. Pr. 227. See, also, Chemin v. City of East Portland, 19 Or. 512, 24 Pac. 1038.

312 Starling v. Burdette, 28 Wash. 261, 68 Pac. 723.

313 White Crest Canning Co. v. Sims, 29 Wash. 389, 69 Pac. 1094.

314 Roush v. Van Hagen, 17 Cal. 121; Lower v. Knox, 10 Cal. 480; Chamberlain v. Dempsey, 13 Abb. Pr. 421, 22 How. Pr. 356; Kelsey v. Campbell, 14 Abb. Pr. 368, 38 Barb. 238.

315 Mokelumne Hill Co. v. Woodbury, 10 Cal. 188.

316 Cal. Code Civ. Proc., § 1057. See, also, Cal. Code Civ. Proc., § 942.

§ 1784. Justification, affidavit of.—Every undertaking must be accompanied by the affidavits of the sureties that each of them is a resident and householder or freeholder within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution.[317] When no exception is taken in the trial court to the affidavit of sureties upon an appeal-bond, the defect is thereby waived, and cannot be raised in the appellate court.[318] The intent of the certificate may be followed, and the word "not" (exempt) be omitted.[319] There being no statute requiring sureties to sign the affidavit of justification, the certificate of the clerk who approves the bond is sufficient proof of their justification.[320]

§ 1785. Remedy on defective undertaking.—An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. Respondent's remedy is by motion in the court below for leave to proceed on the judgment.[321] The court being authorized to permit amendment of a bond, the appeal should not be dismissed because the bond runs to the state instead of to respondents.[322]

§ 1786. Setting aside undertaking.—If an undertaking is defective on an appeal from judgment of sale in foreclosure, the plaintiff should move to set it aside; otherwise, if he proceed to sell the premises under the judgment, the sale must be vacated.[323] Where the undertaking substantially conforms with the requirements of the statute, defects will be disregarded, if not objected to by motion to set it aside.[324] If the time for filing an appeal-bond has expired, after motion to dismiss the appeal for want of sufficient bond, the appellant will not be permitted to file a new bond.[325]

317 Cal. Code Civ. Proc., § 1057.

318 McEachern v. Brackett, 8 Wash. 652, 40 Am. St. 922, 36 Pac. 690.

319 Jones v. Herrick, 33 Wash. 197, 74 Pac. 332.

320 Colburn v. Seymour, 29 Colo. 292, 68 Pac. 219.

321 Dobbins v. Dollarhide, 15 Cal. 374; Mokelumne Hill Co. v. Woodbury, 10 Cal. 185.

322 Westland Pub. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096.

323 Parfitt v. Warner, 13 Abb. Pr. 471. See Johnson v. King, 91 Cal. 307, 27 Pac. 644.

324 Parfitt v. Warner, 13 Abb. Pr. 471.

325 David v. Guich, 30 Wash. 266, 70 Pac. 497; Zane v. De Onativia, 135 Cal. 440, 67 Pac. 685.

§ 1787. Undertaking to effect stay.—Whenever an undertaking has been duly given and perfected, it suspends all further proceedings upon the judgment appealed from, or upon the matter embraced therein, but as regards other matter, the power to proceed is not affected.[326] Unless an undertaking be given, the mere execution and deposit of the instrument with the clerk will be ineffectual, and will procure no stay.[327] When given, such an undertaking only stays future, and does not affect the validity of any past, proceedings. Thus, where given after levy, it does not operate to discharge a lien already affected, but only suspends its enforcement.[328] Such stay is inchoate upon giving the undertaking, but defeasible in case sureties fail to justify, if excepted to.[329] When judgment directs a sale to satisfy a lien other than a mortgage lien, the undertaking need not provide for payment of any deficiency which the judgment may direct to be paid.[330] In other cases, if there is a provision for the payment of a deficiency, the undertaking must provide for such deficiency.[331] And if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property under the lien is not stayed;[332] nor will, in such case, a bond for costs stay the proceedings.[333] A bond given for no more than just the amount designated by the court for a *supersedeas* bond is insufficient as a combined appeal and *supersedeas* bond.[334]

§ 1788. Who exempt from undertaking.—No bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, city, or town.[335] And such is the case where the state is a party de-

326 Curtis v. Stillwell, 32 Barb. 354; Welch v. Cook, 7 How. Pr. 282. See Trustees of Penn Yan v. Forbes, 8 How. Pr. 285.

327 Waring v. Ayres, 12 Abb. Pr. 112.

328 In re Berry, 26 Barb. 55; Cook v. Dickerson, 1 Duer, 679; Bathbone v. Morris, 9 Abb. Pr. 213; Waring v. Ayres, 12 Abb. Pr. 112; Stricker v. Wakeman, 13 Abb. Pr. 85. But see Cal. Code Civ. Proc., §§ 671, 946.

329 Thompson v. Blanchard, 2 N. Y. 561, 4 How. Pr. 260.

330 Englund v. Lewis, 25 Cal. 337.

331 Englund v. Lewis, 25 Cal. 337.

332 Id. See Stafford v. Union Bank of Louisiana, 16 How. 135, 14 L. Ed. 876.

333 Orchard v. Hughes, 1 Wall. 73, 17 L. Ed. 560.

334 Washington Water Power Co. v. Abacus Assoc., 49 Wash. 261, 94 Pac. 1072.

335 Cal. Code Civ. Proc., § 1058. See, also, Kelley v. Kitsap Co., 5 Wash. 521, 32 Pac. 554; Elma v. Carney, 4 Wash. 418, 30 Pac. 732; Holmes v. City of Mattoon, 111 Ill. 27, 53 Am. Rep. 602; Scheerer v.

fendant.[336] The officers of the civil service commission of the city of Seattle are a part of the government, and may appeal in their official capacity without giving bond.[337] But a county auditor must put up a bond on appeal from an order the validity of which the county has acquiesced in by not contesting it in a direct manner.[338] In Colorado, where an appeal is taken by the board of county commissioners in an action against them, the appeal-bond must be executed in the name of the board, and not by the members individually.[339]

§ 1789. **Appeal-bond — Miscellaneous.** — An appeal is not taken or perfected until the appeal-bond is filed.[340] Where no bond is given by the appellant upon appeal, the appellate court is without jurisdiction, and the appeal will be dismissed.[341] To warrant the execution of an appeal-bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond, and when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced.[342] Where a statute requires that the sureties upon an appeal-bond shall be approved by the court, it is competent for the obligee to waive such approval, and if the waiver clearly appear the instrument is binding upon the sureties, though not formally approved.[343] The fact that an appeal has been dismissed upon the appellant's motion will not bar a second appeal, if taken in time, when the only defect in the first appeal was the failure to file a bond within the prescribed time.[344] Parties joining in an appeal subsequent to the original notice, as permitted under the laws of Washington, must file an appeal-bond in addition to that filed by the parties first appealing.[345] Although the filing of a notice and undertaking

Edgar, 67 Cal. 377, 7 Pac. 760; Von Schmidt v. Widber, 99 Cal. 511, 34 Pac. 109.

336 San Francisco Law etc. Co. v. State, 141 Cal. 354, 74 Pac. 1047.

337 Corbett v. Civil Service Commission, 33 Wash. 190, 73 Pac. 1116.

338 State v. Blumberg, 34 Wash. 640, 76 Pac. 272.

339 Commissioners etc. v. King, 9 Colo. 542, 13 Pac. 539.

340 Webber v. Brieger, 1 Colo. App. 92, 27 Pac. 871; Hunt v. Arkell, 13 Colo. 543, 22 Pac. 826.

341 Smithson v. Woodin, 13 Wash. 709, 43 Pac. 638; Bokien v. State, 14 Wash. 401, 44 Pac. 883; Village of Hailey v. Riley, 13 Idaho, 749, 92 Pac. 756.

342 Schofield v. Felt, 10 Colo. 146, 14 Pac. 128.

343 Irwin v. Crook, 17 Colo. 16, 28 Pac. 549. See Easter v. Acklemire, 81 Ind. 163.

344 Tacoma Lumber etc. Co. v. Wolff, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462.

345 Stans v. Baitey, 9 Wash. 115, 37 Pac. 316.

on appeal stays the proceedings of the trial court upon the judgment or order appealed from, it does not divest the court of power to settle and certify such statements as are required to present matters of law or fact to the appellate court.[346]

§ 1790. Action on appeal-bond.—The obligee in appeal-bonds given by the same party in the same action, on appeal from the county court, and also from the district court, may maintain an action on either bond without reference to an action pending on the other.[347] If two bonds are given, a judgment creditor may sue on either, and a surety on such bond cannot have sureties on the other bond made parties defendant.[348] Sureties on an appeal-bond are liable for all costs and damages on all appeals therein referred to.[349] The extent of liability may be for only the costs of the trial and higher courts.[350] It is sufficient consideration for an appeal-bond that it suspended enforcement of the judgment.[351] Sureties of appellant, the third mortgagee, upon affirmance of judgment for foreclosure of the first mortgage are liable for the whole judgment below.[352]

§ 1791. Liability of sureties.—An appeal-bond will be so construed as to carry out the obvious intention of the parties.[353] In an action upon a bond or written undertaking there can be no constructive parties jointly liable with proper obligors.[354] An appeal-bond signed by a firm as sureties on appeal renders only the partner who signed the firm's name liable, unless the other partner assented.[355] A right of action on an undertaking executed to stay a writ of restitution pending an appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until

346 William Mercantile Co. v. Fussey, 13 Mont. 401, 34 Pac. 189; The Latona v. McAllep, 3 Wash. T. 332, 19 Pac. 131; Flynn v. Cottle, 47 Cal. 526.

347 Duncan v. Thomas, 17 Colo. App. 522, 69 Pac. 310.

348 Day v. McPhee, 41 Colo. 467, 93 Pac. 670.

349 Buchner v. Malloy, 152 Cal. 484, 92 Pac. 1029.

350 Stubling v. Wilson, 50 Or. 282, 90 Pac. 1011, 92 Pac. 810.

351 Tanguary v. Bashor, 42 Colo. 231, 94 Pac. 22.

352 Rogers v. Minneapolis Threshing Mach. Co., 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014.

353 Swain v. Graves, 8 Cal. 549. See, as to construction of appeal bond, McCallion v. Hibernia Sav. etc. Soc., 83 Cal. 571, 23 Pac. 798.

354 Lindley v. Flint, 4 Cal. 88; Baula v. Toole, 29 Colo. 52, 66 Pac. 899; German Sav. etc. Soc. v. Kern, 42 Or. 532, 70 Pac. 709.

355 Charman v. McLean, 1 Or. 339.

the applicants deliver possession of the premises recovered.[356] The liability of the sureties cannot be greater than that of the principal.[357] In New York, it has been held that the undertaking only extends to the case of an affirmance of the judgment, and the sureties are not liable on the dismissal of an appeal;[358] but otherwise, if the dismissal be from mere neglect to prosecute the appeal.[359] But now sureties are liable in all cases of dismissal.[360] Affirmance means an affirmance by any tribunal having cognizance of the cause. The sureties upon a joint undertaking are liable, if the judgment is affirmed against one.[361]

§ 1792. The same—Continued.—In attacking the sufficiency of an appeal-bond, merely a *prima facie* showing on the part of the respondent will cast the burden of showing the responsibility of sureties upon the appellant.[362] The justification of the sureties, by their oath attached to the appeal-bond, establishes a *prima facie* justification, which is sufficient, unless overcome at the instance of the party excepting and by the examination of the sureties by him.[363] Where a bond on appeal has no validity as a statutory bond, a motion for a judgment thereon against the sureties should be denied, even if shown to be supported by a consideration, and to be good as a common-law bond.[364] The obligation of the sureties upon an undertaking to stay execution pending an appeal to pay the judgment in case of the default of the defendant is absolute, and continues until the judgment is actually paid.[365]

The fact that the place of trial is transferred to another county because of disqualification of the judge does not release

356 De Castro v. Clarke, 29 Cal. 11.

357 Whitney v. Allen, 21 Cal. 233; Sharon v. Sharon, 84 Cal. 433, 23 Pac. 1102.

358 Watson v. Husson, 1 Duer, 242; Drummond v. Husson, 14 N. Y. 60; Mills v. Forbes (No. 12), 12 How. Pr. 466.

359 Karth v. Light, 15 Cal. 327; Chamberlin v. Reed, 16 Cal. 207; Chase v. Beraud, 29 Cal. 138.

360 See Cal. Code Civ. Proc., § 942.

361 Gardner v. Barney, 24 How. Pr. 467.

362 Kirby v. Collins, 5 Wash. 682, 32 Pac. 769.

363 Bank of Escondido v. Superior Court, 106 Cal. 43, 39 Pac. 211.

364 Powers v. Chabot, 93 Cal. 266, 28 Pac. 1070; Central Lumber etc. Co. v. Center, 107 Cal. 193, 40 Pac. 334.

365 Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627. See Pieper v. Peers, 98 Cal. 42, 32 Pac. 700. See, generally, as to liability of sureties on appeal-bonds, Cline v. Mitchell, 1 Wash. 24, 23 Pac. 1013; Bellingham Bay Nat. Bank v. Central Hotel Co., 4 Wash. 643, 30 Pac. 671; Orr v. Hopkins, 3 N. Mex. 142 (183), 3 Pac. 61; Osborn v. Rogers, 9 N. Y. Supp. 736, 58 Super. 152. As to complaint in

the sureties on the appeal-bond.[366] Imprisonment for contempt in failing to pay a judgment to the estate of his ward does not satisfy an appeal-bond and release the sureties.[367] If the complaint is amended in the district court so as to include another cause of action and change the issues, the sureties are released.[368] The principal may be considered as an agent of the sureties, and waive some rights.[369] The liability of sureties is not extinguished by a judgment in favor of their principal, if that judgment is reversed on a higher appeal, but is fixed by the last decision.[370]

§ 1793. Money judgment.—The undertaking, to operate as a stay of execution, must be in double the amount of the judgment. The conditions of the undertaking are, that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal; and if the appellant does not make such payment in thirty days after the filing of the *remittitur* of the supreme court, judgment may be rendered against the sureties upon motion of the respondents.[371] When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment.[372]

action on appeal-bond, see Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Pieper v. Peers, 98 Cal. 42, 32 Pac. 700; Heshion v. Scott, 94 Ind. 570; Scott v. Merchant, 88 Ind. 349, Pierce v. Banta, 9 Ind. App. 376, 31 N. E. 812. As to entry of judgment against sureties on undertakings on appeal, see Mowry v. Heney, 86 Cal. 471, 25 Pac. 17; Meredith v. Santa Clara Min. Assoc., 60 Cal. 617; Hansen v. Martin, 63 Cal. 282; Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627.

366 Barela v. Tootle, 29 Colo. 52, 66 Pac. 899.

367 Duncan v. Thomas, 17 Colo. App. 522, 69 Pac. 310.

368 Smith v. Haner, 8 Idaho, 370, 69 Pac. 109.

369 Quandt v. Smith, 38 Wash. 93, 80 Pac. 287.

370 Barela v. Tootle, 29 Colo. 52, 66 Pac. 899.

371 Cal. Code Civ. Proc., § 942. See Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627; McCallion v. Hibernia etc. Soc., 98 Cal. 442, 33 Pac. 329; Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

372 Cal. Code Civ. Proc., § 942.

FORMS ON APPEAL.

§ 1794. Notice of appeal to supreme court from an order or part thereof.

Form No. 493.

[Title of action in trial court, naming all parties.]

To E. F., Esq., Attorney for Plaintiff, and L. M., Clerk of the aforesaid Court:

Please take notice, that the defendant above named [or, the defendant, C. D.,] hereby appeals to the supreme court of the state of . . . from the whole of that certain order made and entered in this action by said court on the . . . day of . . . , 19 . . , a copy of which order is hereunto annexed. [Or, in case of an appeal from a part:] that part of the order made and entered in this action, by said court, on the . . . day of . . . , 19 . . , a copy of which order is hereto annexed, which orders that [specify particularly part appealed from].

[DATE.] G. H., Attorney for Defendant, C. D.

§ 1795. Undertaking for costs and damages on appeal.

Form No. 494.

[TITLE.]

Whereas, the . . . in the above-entitled action . . . is about to appeal to the supreme court of the state of . . . from a . . . , entered against . . . in said action, in the said superior court, in favor of the . . . in said action, on the . . . day of . . . , 19. . , for . . . dollars damages, and . . . dollars costs of suit, and . . . :

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, . . . , of the said county of . . . , and . . . , of . . . , do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against . . . on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

[DATE.] [SIGNATURES AND SEALS.]

[Justification as in Form No. 495.]

§ 1796. Undertaking on appeal staying execution.

Form No. 495.

[Title as in trial court.]

Whereas, the defendant in the above-entitled action has appealed or is about to appeal to the district court of appeal of the state of California in and for the . . . district, from the judgment made and entered against him in said action in the superior court of the county of . . ., state of California, in favor of plaintiffs herein, which said judgment was made and entered on the . . . day of . . ., 19.., for . . . dollars, gold coin of the United States, and from the whole thereof, and also from the order of said court denying defendant's motion to vacate said judgment and for a new trial of said action, which said order was entered on the . . . day of . . ., 19.. ; and

[Whereas, said judgment was reduced to the sum of . . . dollars by the remission from said judgment by plaintiffs of the sum of . . . dollars, pursuant to the order of said court denying defendant's said motion to vacate said judgment and for a new trial; and]

Whereas, the appellant herein is desirous of staying the execution of said judgment so appealed from, we, the undersigned, residents of the county of . . ., state of California, do in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves jointly and severally bound in the sum of . . . dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in United States gold coin the amount directed to be paid by said judgment, or the part of the amount as to which the said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant herein upon such appeal; that if the said appellant does not make such payment within thirty days after the filing of the *remittitur* from the district court of appeal in the court from which the appeal is taken, judgment may be entered upon the motion of the respondents and in their favor and against the undersigned sureties for the said amount of said judgment, together with the interest which may be due thereon and the damages and costs that may be awarded against the appellant on appeal.

[DATE.] [SIGNATURES.]

STATE OF CALIFORNIA, }
COUNTY OF . . . } ss.

. . . and . . ., being first duly sworn, each for himself and not one for the other, deposes and says: That he is over the age of twenty-one years, a resident of the county of . . ., state of California, and is a . . . holder within said state; that he is worth the sum of . . . dollars, mentioned in the above bond, over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

[JURAT.] [SIGNATURES.]

§ 1797. Undertaking on appeal from judgment abating a nuisance.

Form No. 496.

[Title as in trial court.]

Whereas, [recite judgment and the particular relief granted by it, and proceed:]

Now, therefore we, N. O. and O. P., both of . . ., in the county of . . ., do hereby undertake that the appellant will pay all costs and damages that may be awarded against him on the appeal, not exceeding three hundred dollars; and, also, do further undertake in the sum of . . . dollars (being the amount fixed by Hon. J. K., presiding judge of said court), that the appellant will pay all damages which the respondent may sustain by the continuance of such nuisance.

[DATE.] N. O.
O. P.

[Justification of sureties.]

§ 1798. Undertaking on appeal from order vacating writ of attachment or injunction.

Form No. 497.

[Title as in trial court.]

Whereas, an order was made in this action on the . . . day of . . ., 19 . . , vacating [or, modifying] the writ of attachment issued in this action, from which order the plaintiff has given [immediate] notice of appeal.

Now, therefore, we, N. O. and O. P., both of the city of . . ., in . . . county, state of . . ., do hereby undertake, in the sum

of . . . dollars (double the amount of the debt claimed by appellant) that if the said order appealed from, or any part thereof, be affirmed, the appellant will pay all costs and damages which said defendant may sustain by reason of the said attachment.

[DATE.] N. O.
O. P.

[Justification of sureties.]

§ 1799. Undertaking when judgment directs delivery of documents or personal property.

Form No. 498.

[Title of action as in trial court.]

Whereas, on the . . . day of . . . , 19 . . , in the . . . court, within and for the county of . . . , the above-named plaintiff recovered a judgment against the above-named defendant, wherein it was adjudged that the said defendant assign [or, deliver] to the plaintiff certain documents in said judgment described [or, deliver to the plaintiff certain personal property in said judgment described] and recover the sum of . . . dollars; and the said defendant being aggrieved thereby intends to appeal to the supreme court of the state of . . .

Now, therefore, we, N. O. and O. P., of . . . , in the said county of . . . , do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal not exceeding . . . dollars; and do also further undertake in the sum of . . . dollars (being the amount directed by the Hon. J. K., presiding judge of said court), that the appellant will obey the order of the appellate court on the appeal.

[DATE.] N. O.
O. P.

[Justification of sureties.]

§ 1800. The same—When judgment directs sale or delivery of real property.

Form No. 499.

[Title of action as in trial court.]

Whereas, on the . . . day of . . . , 19 . . , in the . . . court, within and for the county of . . . , the above-named plaintiff recovered a judgment against the above-named defendant, where-

in the sale [or, delivery of the possession] of certain real property therein described was directed and adjudged, and the said defendant, feeling aggrieved thereby, intends to appeal to the supreme court of the state of . . . :

Now, therefore, we, N. O., and O. P., both of . . . , in the said county of . . . , do hereby undertake that the said appellant will pay all costs that may be awarded against him on said appeal not exceeding . . . dollars, and do also undertake in the sum of . . . dollars (being the amount directed by Hon. J. K., presiding judge of said court), that during the possession of such property by the appellant he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment.

[DATE.] N. O.
O. P.

[Justification of sureties.]

§ 1800a. Undertaking on appeal in ejectment.

Form No. 499a.

[TITLE.]

Whereas, . . . , the . . . in the above-entitled action, has appealed to the supreme court of the state of . . . from a . . . made and entered against . . . in the said action, in the said superior court, in favor of the . . . in said action, on the . . . day of . . . , 19.. , for the recovery of the possession of certain lands and premises therein described, and . . . dollars damages for the detention thereof, and . . . dollars costs of suit:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, . . . , of the said county of . . . , and . . . , of the . . . , do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against . . . on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas, the appellant . . . desirous of staying the execution of the said . . . so appealed from as to the said costs and damages, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do

acknowledge ourselves further jointly and severally bound in the further sum of . . . dollars (being double the amount named in the said . . . for said costs and damages), that if the said . . . appealed from, or any part thereof, in that respect be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

And whereas the appellant . . . desirous of staying the execution of the said . . . so appealed from, in so far as relates to the possession of said land and premises, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of . . . dollars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant, . . . will not commit, or suffer to be committed, any waste thereon, and that if the said . . . appealed from should be affirmed, or the appeal dismissed, . . . will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the sum of . . . dollars, so as aforesaid fixed by the judge of this court, by which the said . . . was . . .

[DATE.] [SIGNATURES.]

[JUSTIFICATION.]

§ 1801. Complaint on appeal-bond or undertaking.

Form No. 500.

[TITLE.]

I. That on the . . . day of . . . , 19 . ., the plaintiff recovered a judgment against the defendant A. B., in the sum of . . . dollars, and costs, in an action pending in the . . . court, of . . . county, wherein this plaintiff was plaintiff, and the said A. B. was defendant.

II. That thereafter the defendant, said A. B., duly perfected his appeal from said judgment to the . . . court of . . . county, state of . . . , and on the . . . day of . . . , 19 . . , with the defendants, C. D. and E. F., as sureties, duly executed and filed with the clerk of said court an appeal-bond [or, undertaking], which said bond [or, undertaking] was duly approved by the clerk of said court [or, judge of said court], and a copy of which

is hereto attached, marked exhibit A, and made a part of this complaint.

III. That on the . . . day of . . . , 19 . . , said . . . court in said action rendered a judgment in favor of the plaintiff and against the defendant, A. B., for the sum of . . . dollars, with his costs [or, affirming said judgment so appealed from, with . . . dollars costs].

IV. That neither of said judgments has been paid, nor any part thereof.

[If demand be necessary before suit, or the lapse of any certain amount of time, allege the same.]

[DEMAND OF JUDGMENT.]

§ 1802. Complaint by surety, on appeal-bond or undertaking.

Form No. 501.

[TITLE.]

I. That on the . . . day of . . . , 19 . . , one E. F. recovered in the . . . court of . . . county, a judgment against defendant for . . . dollars [or, for the possession of specific property, etc.], from which said defendant thereafter duly appealed to the supreme court of the state of . . . [or, other court].

II. That on the . . . day of . . . , 19 . . , at the request of defendant, plaintiff executed an undertaking, a copy of which is hereto annexed and marked exhibit A, [or, whereby he undertook, reciting the obligation].

III. That on the . . . day of . . . , 19 . . , the said judgment was affirmed by the said supreme court, with . . . dollars costs and damages.

IV. That on the . . . day of . . . , 19 . . , the plaintiff was compelled to pay, and did pay, . . . dollars upon the said undertaking to the said E. F., and that no part of the same has been repaid to him.

[DEMAND OF JUDGMENT.]

CHAPTER LXIV.

STATEMENT ON APPEAL.

§ 1803. In general.—Under section 188 of the California Practice Act, the party wishing to appeal prepared a "statement," stating therein, specifically, the errors or grounds upon which he intended to rely upon the appeal, and inserting so much of the evidence as might be necessary to explain the particular errors or grounds specified. By another section it was provided that an exception, when not delivered in writing, or written down by the clerk, might be entered in the judge's minutes, and afterwards settled in a statement of the case.[1] If exceptions were reduced to writing, settled, and allowed by the judge during the trial and before judgment, they became part of the judgment-roll without further action by the court or party; otherwise, the party was allowed twenty days to prepare his statement. The Code of Civil Procedure does not in terms provide for a statement on appeal, except where a statement has been made under a motion for new trial, in which case such statement "may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."[2] But though the Code of Civil Procedure does not provide for a "statement" on appeal, such as was authorized by section 188 of the Practice Act, the same thing in substance is accomplished by a "bill of exceptions," prepared and settled in a similar manner.[3] There is no difference between a statement and a bill of exceptions in form or substance, except that the former follows a notice of motion for a new trial.[4] A bill of exceptions to any decision may be presented to the court or judge for settlement within ten days after the decision, and when settled and signed by the judge, is filed by the clerk.[5] Such bill of exceptions becomes part of the judgment-roll, which is made up by the clerk immediately after entering judgment.[6] It must appear that there

1 Cal. Practice Act, § 189.
2 Cal. Code Civ. Proc., § 950.
3 See Cal. Code Civ. Proc., § 650.
4 People v. Crane, 60 Cal. 279; Schultz v. Keeler, 2 Idaho, 333, 13 Pac. 481.
5 Cal. Code Civ. Proc., § 649.
6 Cal. Code Civ. Proc., §§ 670, 950.

is a judgment against the appellant.[7] Where the bill of exceptions is settled after judgment, it is filed with the clerk; but there is no provision making it a part of the record or judgment-roll. Such bill of exceptions, however, must be furnished to the supreme court by the appellant, if he relies upon it, together with his notice of appeal and a copy of the judgment-roll.[8] While this does not make it a part of the judgment-roll, and therefore not a part of the record in the court below, it becomes a part of the record on appeal from the judgment.[9] In Arizona, prior to 1907, an uncertified transcript of the reporter's notes, while not serving as a bill of exceptions, was sufficient to serve as a statement of the evidence, since neither the statute nor the rules of the court required such transcript to be certified.[10] As a statement on appeal and a bill of exceptions settled perform the same office in an appeal from a judgment, differing only in name and partially in form, and the former being perhaps still admissible, the decisions under the former Practice Act are still valuable, and in most respects applicable.[11]

The office of the statement is to bring into the record orders and rulings, with facts necessary to explain them, which are made in all stages of the proceedings, as well as during the progress of the trial, and not contained in the judgment-roll.[12] And questions not arising on the judgment-roll are thus presented.[13] But if an appeal is taken from the judgment-roll alone, no statement of grounds or errors need be assigned, nor need any be contained in the transcript.[14] On an appeal from a judgment, the judgment-roll alone is brought before the appellate court.[15] The case regularly settled and filed, and made part of the papers presented to the court, is indispensable.[16] Non-appealable orders can be reviewed only by means of a statement on appeal from the final judgment.[17] Exceptions to findings of law and fact cannot be considered in the absence of a

7 Young v. Hatch, 30 Colo. 422, 70 Pac. 693.

8 Cal. Code Civ. Proc., § 950.

9 Caldwell v. Parks, 47 Cal. 640; Berry v. San Francisco etc. R. Co., 47 Cal. 643.

10 Leatherwood v. Richardson (Ariz.), 94 Pac. 1110.

11 Wetherbee v. Carroll, 33 Cal. 549; Cal. Code Civ. Proc., § 650.

12 Abbott v. Douglass, 28 Cal. 299; De Johnson v. Sepulveda, 5 Cal. 149; Harper v. Minor, 27 Cal. 107.

13 Wetherbee v. Carroll, 33 Cal. 549.

14 Solomon v. Reese, 34 Cal. 28; Jones v. City of Petaluma, 36 Cal. 230.

15 Clark v. Baker, 6 Mont. 153, 9 Pac. 911.

16 Conolly v. Conolly, 16 How. Pr. 224; Broward v. State, 9 Fla. 422.

17 Gates v. Walker, 35 Cal. 289.

statement.[18] Where, on appeal from an order subsequent to final judgment, objections to the consideration of certain affidavits contained in the record were not taken as required by rule 15 of the supreme court, such objections will be deemed waived; but the rule is otherwise in respect to the subject-matter of a statement on appeal contained in such record, where no statement embodying the same, duly settled, certified, or agreed to, as required by law, existed in the court below.[19] The allegation of the omission of the judge to settle a statement which was submitted to him cannot be taken as a substitute for a statement.[20] To review the final decision of a referee, a case must be made containing the facts found by the referee, his conclusions of law thereon, and the exceptions of the party who appeals.[21] To review the sufficiency of evidence taken before a referee, a bill of exceptions containing such evidence must be certified to by the referee;[22] and if such bill of exceptions or statement of facts be stricken out, the evidence cannot be reviewed.[23] A case should present with legal and logical precision the questions which are to be examined, and should contain nothing else.[24] Extrinsic matters constituting no part of the record cannot be incorporated.[25] The questions of law and fact raised must be distinctly set forth, accompanied with only so much evidence as may be necessary to show their pertinency and materiality; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated in order to explain the points specified, and that it would not have presented a different case, in respect to the specified points, had it contained also the omitted evidence.[26] A statement of facts is not required on appeal

18 Thacker etc. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199.

19 Wetherbee v. Carroll, 33 Cal. 549; Rogers v. Parish, 35 Cal. 127.

20 Hoadley v. Crow, 22 Cal. 265.

21 Johnson v. Whitlock, 13 N. Y. 344; Westcott v. Thompson, 16 N. Y. 613. See Bash v. Culver etc. Min. Co., 7 Wash. 122, 34 Pac. 462.

22 Campbell v. Sherman, 20 Okla. 185, 95 Pac. 238.

23 Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

24 Bissel v. Hamlin, 20 N. Y. 519.

25 Territory v. Cooper, 11 Okla. 699, 69 Pac. 813.

26 Abbey Homestead Association v. Willard, 48 Cal. 619. See, also, People v. Armstrong, 44 Cal. 327; Bush v. Taylor, 45 Cal. 112; Ferrer v. Home Mut. Ins. Co., 47 Cal. 427. As to necessity and sufficiency of statement on appeal, see Puget Sound Iron Co. v. Worthington, 2 Wash. T. 472, 7 Pac. 882, 886; Caton v. Switzler, 3 Wash. T. 242, 13 Pac. 712; Cogswell v. West etc. Ry. Co., 5 Wash. 46, 31 Pac. 411; Barber v. Briscoe, 8 Mont. 214,

in an equity cause where the whole case has been determined upon the pleadings.[27]

Where a judgment on trial by the court comes up for review without any finding of facts, nothing can be presumed against the correctness of the judge's decision.[28] The appellate court cannot look beyond the findings of fact contained in the case in order to draw any inference of fact bearing on the appeal.[29] It is essential that the finding upon the facts be explicit, and cover all the material facts in the case.[30] In order to review the judgment after trial by the court, or the decision of a referee, a statement of the facts found by the judge, and his conclusions of law, are imperatively required. The party who prepares the case should insert the statement, which will be subject to amendment and settlement by the judge. If a conclusion of fact is to be reviewed, then the evidence bearing upon that conclusion must be inserted. It will also contain the exceptions taken during the trial, and those taken after trial and judgment.[31] On appeal from an order granting or refusing a new trial, the appellate court is confined to the record on which the court below ruled.[32] On a direct appeal from a judgment, the jurisdiction of the trial court must appear on the face of the record.[33] Where the appellants, in their statement on motion for a new trial, fail to specify the particulars in which the evidence is alleged to be insufficient to justify the findings, the findings of fact will not be reviewed on an appeal from an order denying a new trial.[34] The following copy of the order of the court in denying the application for a new trial: "Now, on this day, in open court, comes on to be heard defendants' motion for a new trial, and thereupon, after having heard the arguments of counsel,

19 Pac. 589; Healy v. Seward, 5 Wash. 319, 31 Pac. 874; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004.

27 Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009.

28 Viele v. Troy etc. R. R. Co., 20 N. Y. 184; Carman v. Pultz, 21 N. Y. 547.

29 Stewart v. Smith, 14 Abb. Pr. 75.

30 Rogers v. Beard, 20 How. Pr. 282.

31 Hunt v. Bloomer, 13 N. Y. 341; Magie v. Baker, 14 N. Y. 435; Johnson v. Whitlock, 13 N. Y. 344; Brewer v. Isish, 12 How. Pr. 481.

32 Quivey v. Gambert, 32 Cal. 304.

33 Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105.

34 Cal. Code Civ. Proc., § 659, subd. 3. See Kelly v. Mack, 49 Cal. 524; Coleman v. Gilmore, 49 Cal. 340; Martin v. Matfield, 49 Cal. 42; The Abbey H. A. v. Willard, 48 Cal. 614; Thorne v. Hammond, 46 Cal. 530; Doherty v. Enterprise Min. Co., 50 Cal. 187; Spanagel v. Dellinger, 38 Cal. 280.

the court overrules the same, to which ruling of the court defendants, by counsel, except," was held not to show an appearance of the counsel of the plaintiff at the argument of the motion, and therefore did not show a waiver of the objection to the filing of the statement.[35] In a vast majority of cases there would be no occasion for a motion for a new trial if the findings were what they ought to be; for in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or for bringing the evidence to this court in any form. Every such case ought to come here upon the judgment-roll.[36] A stipulation that a statement "be used on the motion for a new trial, and also on the appeal to the supreme court," includes an appeal both from the judgment and the order on motion for new trial.[37]

§ 1804. Preparing statement.—It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document, and at the head say "title of cause," and where a paper is verified or acknowledged, to say "duly verified" or "duly acknowledged," the date of the paper, date of filing, date of service, etc.; the rest may with advantage be omitted.[38] Where an appeal is taken from an order made upon other evidence, either alone or in connection with affidavits, documents not filed, judgment-rolls, and files in other cases, which are not and cannot be made a part of the files in the case heard, and questions of admissibility of evidence, etc., which may arise, so much of these as is necessary to present the legal points contested is made part of the record by statement, and no other method is provided.[39] A case which refers to a paper in the judgment-roll for a statement of facts and conclusions of law, and to another schedule or paper for the exceptions, is inartificial.[40] If an affidavit is referred to as filed and read on

35 Munch v. Williamson, 24 Cal. 169.

36 Tewksbury v. Magraff, 33 Cal. 237.

37 Hastings v. Halleck, 13 Cal. 203; Godchaux v. Mulford, 26 Cal. 316; 85 Am. Dec. 178; Burnett v. Pacheco, 27 Cal. 409.

38 Marriner v. Smith, 27 Cal. 654.

39 Haggin v. Clark, 28 Cal. 162. See, also, Abbott v. Douglass, 28 Cal. 299; Hutton v. Reed, 25 Cal. 479; Harper v. Minor, 27 Cal. 107.

40 Smith v. Grant, 15 N. Y. 590; Magie v. Baker, 14 N. Y. 435. Exhibits, as to how made part of statement, see Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

a certain date, it cannot be presumed to be an affidavit actually read and filed on a different date.[41] Extrinsic matters constituting no part of the record or proceedings in the trial court cannot be incorporated in the case-made, so as to bring such matters before the appellate court.[42] Where certain exhibits were introduced into evidence, and therefore attached to the statement on appeal, the date of their physical annexation to the statement was not material, they having been sufficiently indorsed and marked for identification.[43]

§ 1805. When statement unnecessary.—In Nevada, in appeals from orders granting or refusing a new trial, a statement on appeal is not necessary.[44] So from an order made on affidavits filed.[45] Nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order of discharge in certain cases.[46] Where no statement on appeal is required, no specification of errors is required.[47] The statement prepared and used on the hearing of the motion for a new trial in the court below will be sufficient.[48] The affidavits must be annexed to the order in place of a statement, and the certificate of the clerk should specify the affidavits used, which should have been marked at the time as filed on the motion.[49] But in other cases, if there is no statement on appeal, and no specification of errors, the appeal will be disregarded.[50] Where there is no assignment of errors or statement of the points and authorities on which the appellant relies, the appeal will be dismissed.[51] Exceptions to findings of law and fact cannot be considered in

41 San Diego Sav. Bank v. Goodsell, 137 Cal. 420, 70 Pac. 299.

42 Territory v. Cooper, 11 Okla. 699, 69 Pac. 813.

43 Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071; O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 692.

44 Gregory v. Frothingham, 1 Nev. 253. As to review without statement or bill of exceptions under Montana practice, see Bookwalter v. Conrad, 14 Mont. 62, 35 Pac. 226; Granite Mountain Min. Co. v. Weinstein, 7 Mont. 346, 17 Pac. 108; Fredericks v. Davis, 6 Mont. 457, 13 Pac. 124. Under Washington practice, see Seattle etc. Ry. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567.

45 Paine v. Linhill, 10 Cal. 370; Stone v. Stone, 17 Cal. 514; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Haggin v. Clark, 28 Cal. 162; Gray v. Harrison, 1 Nev. 502.

46 Haggin v. Clark, 28 Cal. 162.

47 Burnett v. Pacheco, 27 Cal. 408; Hutton v. Reed, 25 Cal. 478.

48 Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135; Cal. Code Civ. Proc., § 950.

49 Paine v. Linhill, 10 Cal. 370; Stone v. Stone, 17 Cal. 513.

50 Burnett v. Pacheco, 27 Cal. 409.

51 People v. Comedo, 11 Cal. 70.

the absence of a statement of facts.[52] Where it appears on error that no proper bill of exceptions had been or could be allowed in the case, and there is nothing for the court to review in absence of a bill of exceptions, the cause will be dismissed.[53]

§ 1806. **What statement shall contain.**—The statement shall state specifically the particular errors or grounds upon which the appellant intends to rely on the appeal.[54] Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the court below.[55] By an assignment of errors is meant a specification of the errors upon which appellant will rely, with such fullness as will give aid to the court in the examination of the transcript.[56] A statement which does not contain a copy or synopsis of the pleadings, any motion for a new trial, or any final order or judgment, but merely a purported transcript of the stenographer's notes, presents no question for review.[57]

Errors at the trial cannot be reviewed except upon a sufficient case or exceptions.[58] A statement that certain action of the court below was wrong is insufficient.[59] The appellant must show wherein the error consists.[60] And failing to specify the grounds, it forms no part of the record.[61] Errors of law on a motion for a new trial must be specified.[62] So, also, from an order made after judgment,[63] and from an order granting nonsuit.[64] A general objection to the form of a verdict, without any specification of the particulars, will not be considered.[65] A specification of the particular grounds of error is the essential element; the evidence is the mere incident.[66] What is contained in the

52 Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199.

53 J. V. Cantlin & Co. v. Miller & Chapman, 13 Wyo. 109, 78 Pac. 295.

54 Cal. Code Civ. Proc., §§ 659, 661.

55 Ford v. Holton, 5 Cal. 320; Todd v. Winants, 36 Cal. 129; Nosler v. Haynes, 2 Nev. 53; Champion v. Sessions, 2 Nev. 272.

56 Squires v. Foorman, 10 Cal. 298.

57 High v. United States, 14 Okla. 399, 78 Pac. 100.

58 Burnett v. Pacheco, 27 Cal. 408; Otis v. Spencer, 16 N. Y. 610, 6 Abb. Pr. 127, 15 How. Pr. 425; Turner v. Haight, 16 N. Y. 465.

59 Crisman v. Smith, 22 Ind. 13.

60 Ford v. Holton, 5 Cal. 320; approved in Owen v. Morton, 24 Cal. 378; Brown v. Tolles, 7 Cal. 398; People v. Richmond, 29 Cal. 414.

61 Reynolds v. Lawrence, 15 Cal. 359.

62 Barstow v. Newman, 34 Cal. 90; Loucks v. Edmondson, 18 Cal. 203.

63 Leffingwell v. Griffing, 29 Cal. 192.

64 Morgan v. Thrift, 2 Cal. 562; Holverstot v. Bugby, 13 Cal. 43.

65 Douglass v. Kraft, 9 Cal. 562; Mahoney v. Van Winkle, 21 Cal. 552.

66 Id.; Wixon v. Bear River & Au-

case-made must be ascertained from the statements therein, and not from the certificate of the trial judge appended thereto.[67] Where the judge amended his certificate to the statement of facts, which originally recited that it contained all the material facts, so as to recite that the papers composing the same were matters and things occurring in the case, thereby showing that the statement did not contain all of the facts and proceedings such statement could not be considered by the supreme court.[68] On the ground of error in improperly admitting evidence irrelevant to the issue, the irrelevancy must clearly appear; some facts should be adduced showing its admission had an undue influence upon the verdict of the jury.[69] So as to the exclusion of evidence, its relevancy and the purpose for which it is offered must be stated.[70] The naked direction of a court, unaccompanied by any facts, cannot support allegations of error.[71] Errors assigned upon instructions will not be considered, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions.[72] An assignment of error that the verdict of the jury was against the law is improper.[73] An assignment of error to an answer to a point propounded on the trial below must repeat the point.[74] An objection to evidence offered and received should be specific.[75]

The supreme court cannot receive evidence otherwise than through the statement or the record.[76] The statement shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more,[77] and so much of the evidence, rulings of the court, etc., as may be necessary to explain the points relied on.[78] A mere inference arising

burn Water & Mining Co., 24 Cal. 367, 85 Am. Dec. 69; Walls v. Preston, 25 Cal. 59; Millard v. Hathaway, 27 Cal. 119; Crowther v. Rowlandson, 27 Cal. 376; Moore v. Murdock, 26 Cal. 524; Burnett v. Pacheco, 27 Cal. 410.

67 Exendine v. Goldstine, 14 Okla. 100, 77 Pac. 45.

68 In re Holburtes Estate, 38 Wash. 199, 80 Pac. 294.

69 See Cal. Code Civ. Proc., § 661; McGarrity v. Byington, 12 Cal. 426; Green v. Killey, 38 Cal. 201.

70 Roberts v. Unger, 30 Cal. 676.

71 White v. Abernathy, 3 Cal. 426.

72 Nelson v. Mitchell, 10 Cal. 92.

73 Schofield v. Ferrers, 46 Pa. St. 438.

74 Ditmars v. Commonwealth, 47 Pa. St. 335.

75 Cullum v. Wagstaff, 48 Pa. St. 300.

76 Visher v. Webster, 13 Cal. 58; Roebling's Sons Co. v. Gray, 139 Cal. 607, 73 Pac. 422; Hays v. Crutcher, 10 Idaho, 260, 77 Pac. 620; Anderson v. McGregor, 36 Wash. 124, 78 Pac. 776.

77 Cal. Code Civ. Proc., § 648; Hutton v. Reed, 25 Cal. 478; Haggin v. Clark, 28 Cal. 162.

78 Hutton v. Reed, 25 Cal. 478; Stone v. Stone, 17 Cal. 513.

from the record, that there was other evidence introduced, will not outweigh the positive statement of the trial judge that all the evidence is set out in the statement.[79] It is not necessary that the evidence should be in the precise words of each witness.[80] A brief synopsis of its substance is proper.[81] The bodily insertion of the reporter's notes is condemned.[82] A mere rescript of the testimony by question and answer, with the objections taken and the rulings therein, will not be regarded as a compliance with section 648 of the Code of Civil Procedure.[83] It will be presumed that the statement contains all the evidence pertinent to the motion.[84] A reference to the evidence as taken by the clerk is sufficient, the evidence being in the transcript. The statement need not contain the evidence.[85] Where the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence.[86]

§ 1807. **Minutes of the court.**—The minutes of the court, to form part of the record, must be embodied in the statement or bill of exceptions.[87] Instead of copying deeds and transcripts of record, where no point is made on the construction of the language, a brief statement of the instrument answers every purpose.[88]

§ 1808. **Skeleton statement.**—A statement containing the words "here insert," etc., describing writ, omitting without consent documents thus directed to be inserted in the statement as settled, will be stricken from the transcript on appeal. When documentary evidence is referred to in a statement on motion for a new trial, the appellant cannot without the assent of the other party insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled and authenticated, or unless the originals are on the files of the court or

79 Gardner v. Kime, 20 Okla. 784, 95 Pac. 242.

80 Battersby v. Abbott, 9 Cal. 565.

81 Ross v. Roadhouse, 36 Cal. 585.

82 People v. Getty, 49 Cal. 584.

83 Caldwell v. Parks, 50 Cal. 502. Compare Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101.

84 Smith v. Athern, 34 Cal. 506.

85 Darst v. Rush, 14 Cal. 81.

86 Moore v. Tice, 22 Cal. 514.

87 Dawley v. Hovious, 23 Cal. 103; Harper v. Minor, 27 Cal. 107; Moore v. Del Valle, 28 Cal. 174; Abbott v. Douglass, 28 Cal. 299; Mendocino Co. v. Morris, 32 Cal. 145; People v. Empire Gold etc. Min. Co., 33 Cal. 171.

88 Knowles v. Inches, 12 Cal. 212.

constitute a part of the records.[89] So much of instruments, when objected to as evidence, should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken.[90]

§ 1809. **Written instruments, etc.**—Where a notice of motion to dismiss a complaint on specific grounds is given, to review the order made, the record must disclose the papers read or the evidence offered in their support.[91] No errors can be assigned on an instrument not embodied in the statement on appeal.[92] So where affidavits are used in support of a motion for new trial, the affidavits must be set forth, but the omission does not affect the appellant's right to raise the question as to errors apparent on the face of the record.[93] Where a written or printed instrument, as a newspaper "card," is rejected as evidence in the court below, such evidence, or the substance of it, must be returned with the record.[94] Where certain exhibits were introduced in evidence, and thereafter attached to the statement on appeal, the date of their physical annexation to the statement was not material, they having been sufficiently indorsed and marked for identification.[95] Interlocutory orders must be embodied in a statement or bill of exceptions.[96] From a decision on *habeas corpus*, the facts on which such decision was based must be presented.[97] A stipulation inserted in the transcript, and not embodied in the statement or bill of exceptions, forms no part of the record.[98]

§ 1810. **Filing and serving statement.**—A statement on appeal must be filed within the time prescribed by law, or the right is waived.[99] The objection that the statement of facts was not filed within the time prescribed by the statute, being a jurisdictional question, may be raised for the first time in the appellate court.[100]

89 Kimball v. Semple, 31 Cal. 657.
90 Provost v. Piper, 9 Cal. 552.
91 Freeborn v. Glazer, 10 Cal. 337.
92 Moore v. Semple, 11 Cal. 360.
93 Branger v. Chevalier, 9 Cal. 353.
94 Dwinelle v. Henriquez, 1 Cal. 387.
95 Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071.
96 Abbott v. Douglass, 28 Cal. 295.
97 Ex parte Cleveland, 36 Ala. 306.
98 Ritter v. Mason, 11 Cal. 214.
99 Heihn v. Stansbury, 12 Cal. 412; Lafferty v. Brownlee, 11 Cal. 132; Harper v. Minor, 27 Cal. 107; Ryan v. Dougherty, 30 Cal. 221; Quivey v. Gambert, 32 Cal. 312; McIntyre v. Willis, 20 Cal. 177; Bell v. Southern Pacific Co., 137 Cal. 77, 69 Pac. 692.
100 Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012.

Where the thirty days allowed after the entry of judgment in the superior court to file a statement of facts is extended by order of the court without any notice of the application therefor to the opposite party or his counsel, a statement of facts filed after the expiration of the thirty days is insufficient to support an appeal.[101] Where a motion to vacate an order of final distribution was denied, a notice of appeal was given, both from the order of final distribution and from the order denying the motion to vacate, and a statement of facts, containing the evidence taken on the hearing for final settlement, and also the affidavits filed at the hearing of the motion to vacate, was filed after the expiration of thirty days from the entry of the order of final distribution, the statement of facts relating to the trial upon the hearing for final distribution cannot be considered, and will be stricken out on motion.[102] An oral agreement to enter into a written stipulation for an extension of time for the filing of a statement of facts does not take the place of a written stipulation.[103] Moving for a new trial does not of itself operate to extend the time for filing a statement.[104] A party desiring to appeal has a right to wait until the written judgment is filed in the case before preparing his statement of facts.[105] If notice of appeal be regularly served and filed, but no case or exceptions be filed within the statutory time, the appeal is left upon the judgment-roll.[106] Under the Washington statute,[106a] the service of a proposed statement of facts upon the only parties adverse to the appellant is sufficient, although there are other parties to the action who do not join the appellant in the appeal.[107] If the appealed case is submitted on briefs, and they are not filed within the time specified, and the transcript contains no assignment of errors, the judgment will be affirmed.[108] In New York, a case or exceptions cannot form part of the papers on an appeal unless filed prior to entry of

101 Wollin v. Smith, 27 Wash. 349, 67 Pac. 561; Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

102 Lamona v. Cowley, 31 Wash. 297, 71 Pac. 1040.

103 Humes v. Hillman, 39 Wash. 107, 80 Pac. 1104.

104 Bryan v. Maume, 28 Cal. 238; Harper v. Minor, 27 Cal. 107; Mahoney v. Caperton, 15 Cal. 313. For the time within which statements and bills of exceptions must be prepared and settled, see Cal. Code Civ. Proc., §§ 650, 659, 661.

105 Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98.

106 Robinson v. Hudson River R. R. Co., 3 Abb. Pr. 115; Conolly v. Conolly, 16 How. Pr. 224.

106a Laws 1893, p. 114, § 9.

107 Howard v. Shaw, 10 Wash. 151, 38 Pac. 746.

108 Holm v. Roach, 25 Cal. 37.

judgment, or unless an order be obtained authorizing the case or exceptions to be annexed to and form part of the judgment-roll.[109] The court refused to remand the cause for the purpose of amending the bill; but the court declined to decide that a new bill, with proper amendments, could not be filed.[110] The time for preparing and filing a statement may be enlarged upon good cause shown.[111] The time for filing statement may be extended thirty days beyond the twenty days allowed by statute;[112] and if more than thirty days' extension is granted, is good for the thirty days without consent of opposite party.[113] Until the time, or its extension, given to file a case after its settlement has expired, the case cannot be noticed for argument.[114] After a statement is settled and filed, and becomes a record, it may be taken in the further progress of the action as *prima facie* evidence of the facts therein appearing.[115]

§ 1811. Amendments.—After the draft of the bill of exceptions has been served on the opposite party, ten days are allowed within which to prepare and serve amendments thereto. The statement and amendments which may be served shall be presented to the judge who tried or heard the case, within ten days thereafter, upon notice of five days to the respondent, and a true statement shall thereupon be settled by the judge; if no amendments are served, then without any notice to the respondent.[116] Unless the respondent serves and files amendments within five days after service and filing of statement, he is deemed to have agreed to the statement; or the judge, without notice to the respondent, may settle and authenticate it.[117] A party is not at liberty to serve an entire new case as an amendment, without special leave from the court.[118] The fact that no amendments were proposed to a draft of a bill of exceptions proposed by the

109 Anderson v. Dickie, 26 How. Pr. 199.

110 Mulford v. Cohn, 18 Cal. 42.

111 Cal. Code Civ. Proc., §§ 650, 651, 661.

112 Cal. Code Civ. Proc., § 1054; Bryan v. Maume, 28 Cal. 238.

113 Id. See Loos v. Rondema, 10 Wash. 164, 38 Pac. 1012; Sadler v. Niesz, 5 Wash. 182, 31 Pac. 630, 1030.

114 Donohue v. Hicks, 21 How. Pr. 438.

115 Van Bergen v. Ackles, 21 How. Pr. 314.

116 Cal. Code Civ. Proc., § 650; Estate of Lamb, 95 Cal. 397, 30 Pac. 568; In re Gates, 90 Cal. 257, 27 Pac. 195; Flagg v. Puterbaugh, 98 Cal. 134, 32 Pac. 863; American Pub. Co. v. Mayne Co., 9 Utah, 318, 34 Pac. 247.

117 Connor v. Morris, 23 Cal. 447; Bryan v. Maume, 28 Cal. 238; Kavanagh v. Maus, 28 Cal. 261.

118 Stuart v. Binsse, 4 Bosw. 616.

appellant does not preclude the trial judge from amending the bill to conform to the facts.[119] Under the Washington practice, where a proposed statement has been filed, and ten days have elapsed without the filing of proposed amendments thereto, the court cannot permit a withdrawal for the purposes of amendment, although the time for filing the statement has not expired.[120]

§ 1812. Authentication of statement.—The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed and is correct; or the attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the clerk.[121] A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judicial officer. If such judge or judicial officer, before the bill of exceptions is settled dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may by its order or rules direct. This provision also applies to the settlement and certifying of statements.[122] Where a suit is begun before a judge having charge of the equity cases arising in a county, and during its progress is transferred by him to another judge having charge of the jury cases, for the purpose of submitting certain questions of fact to the jury, the second judge acquires no jurisdiction of the suit, and, on appeal, the only judge authorized to certify a statement of facts is the one who originally assumed jurisdiction.[123] The certificate of a judge is a sufficient authentication that the statement is substantially correct.[124] But a statement certified by the judge to be correct according to his recollection is not sufficient.[125] The authentication of the judge or attorneys should be indorsed on the engrossed statement.[126] A judge can revoke his certificate during the term at which judg-

119 Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092.

120 State v. Linn, 35 Wash. 116, 76 Pac. 513.

121 Cal. Code Civ. Proc., § 650.

122 Cal. Code Civ. Proc., § 653.

123 Hill v. Young, 7 Wash. 33, 34 Pac. 144. See Michigan Mfg. Co. v. Saunders, 7 Wash. 302, 34 Pac. 1102.

124 Redman v. Gulnac, 5 Cal. 148; Battersby v. Abbott, 9 Cal. 565.

125 Van Pelt v. Littler, 14 Cal. 194.

126 Kimball v. Semple, 31 Cal. 657.

ment was rendered, but after the term he cannot.[127] An authentication need not affirmatively show that the settlement was upon proper notice or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts.[128] In Colorado, the authentication must be by the clerk.[129]

§ 1813. Authentication insufficient.—An indorsement by the judge at the bottom of a statement made in a motion for a new trial, that the amendments to the statement were allowed, is not sufficient authentication.[130] So a clerk's certificate that a statement is the same as that used on motion for a new trial is entitled to no weight.[131] And where the statute requires the clerk to certify that the transcript has been properly filed, a certificate omitting the word "properly" is insufficient.[132] No mode of authentication is pointed out by the statute, and any satisfactory evidence that the statement has been examined and approved by the judge is sufficient.[133] An unauthenticated document purporting to be a statement on motion for a new trial will be stricken from the transcript on appeal;[134] and if a second statement is afterwards brought up, duly certified, but defective, the two statements cannot be used in connection.[135] Where a party appears and argues a motion for a new trial, it is a waiver of want of settlement and an authentication.[136] A statement on appeal may be agreed to by the parties or their attorneys, and certified to by them as correct, or it may be certified to by the judge. But in all cases the statement on motion for a new trial must be certified to by the judge.[137]

127 Branger v. Chevalier, 9 Cal. 172.

128 Battersby v. Abbott, 9 Cal. 565.

129 Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16.

130 Baldwin v. Ferre, 23 Cal. 462.

131 Fee v. Starr, 13 Cal. 170.

132 Davidson v. Wample, 29 Mont. 61, 74 Pac. 82.

133 Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472.

134 Kimball v. Semple, 31 Cal. 657.

135 Id.; Whitmore v. Shiverick, 3 Nev. 288.

136 Dickinson v. Van Horn, 9 Cal. 207; Williams v. Gregory, 9 Cal. 76. See Morris v. Angle, 42 Cal. 236. As to sufficiency of certification of statement, see Miller v. Washington etc. Sav. Bank, 5 Wash. 200, 31 Pac. 712; Small v. Geddis, 4 Wash. 518, 30 Pac. 746; Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96; McReavy v. Eshelman, 4 Wash. 757, 31 Pac. 35; Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536; Kellogg v. Bradley, 3 Wash. 429, 28 Pac. 367; Schlaechter v. Miller, 4 Wash. 463, 30 Pac. 745, 31 Pac. 595.

137 Raymond v. Thexton, 7 Mont. 299, 17 Pac. 258.

§ 1814. Correcting statement.—The supreme court will not amend a statement by adding thereto facts which occurred in the court below during the trial. The record in the supreme court must remain as settled in the court below.[138] A motion to correct a statement on exceptions is an original proceeding in the supreme court, and must be instituted by a petition in writing, which petition should be presented with the record and the application made before the case is submitted.[139] And a motion to include matter in the record made after the opinion has been handed down comes too late.[140] Orders which the court of appeals has no jurisdiction to review, and the papers upon which such orders were granted, will be stricken out on motion.[141] But imperfections in form should be disregarded.[142] A supplemental transcript may be allowed to bring up material matters, notwithstanding issue has been joined in the appellate court.[143]

§ 1815. Engrossing statement.—Where amendments are made to a statement, a fair copy of the statement so amended must be made; likewise where deeds or documentary evidence are directed to be inserted.[144]

§ 1816. Objection to statement.—The place to object to immaterial matter in a statement is where it is made up and settled. If immaterial matter is introduced, and that fact is made to appear in the records, the party insisting on its introduction will be taxed with the costs of the immaterial matter.[145] A motion for leave to withdraw the clerk's certificate to the transcript for the purpose of amendment comes too late when more than a year has elapsed since the rendition of the judgment appealed from.[146]

§ 1817. Statement must be made.—A party appealing must make his case and have it settled with such statement of facts as will necessarily show the law is in his favor; if not, every

138 Satterlee v. Bliss, 36 Cal. 489; Boyle v. Union Pacific R. R. Co., 25 Utah, 420, 71 Pac. 988.

139 Wormouth v. Gardner, 35 Cal. 227.

140 Carnahan v. Connolly, 17 Colo. App. 98, 68 Pac. 836.

141 Smith v. Grant, 15 N. Y. 590.

142 Ringgold v. Haven, 1 Cal. 113.

143 Joralmon v. McPhee, 29 Colo. 135, 66 Pac. 882; Stratton v. Midland etc. Co., 32 Colo. 493, 77 Pac. 247.

144 Marlow v. Marsh, 9 Cal. 259; Skillman v. Riley, 10 Cal. 300; Kimball v. Semple, 31 Cal. 661.

145 Kimball v. Semple, 31 Cal. 658.

146 Wolcher v. Stone, 15 Okla. 130, 79 Pac. 771.

intendment not unreasonable in itself will be against him.[147] A statement will not be regarded unless it is agreed to by the attorneys of the respective parties, or settled and authenticated by the court.[148] In Washington, a statement cannot be settled by the trial judge after he has gone out of office.[149] And a notice to appear and participate in the settlement on Sunday is ineffectual.[150] The settlement of a case is a judicial and not a ministerial act.[151] In New York, the case must be settled by the court below, and be inserted in the record, and should contain, not the evidence, but only the conclusions of fact drawn from the evidence by the court below.[152] Where before settlement the judge who tried the case died, the case might be presented upon affidavits.[153] A writ of mandate may issue to compel a judge to settle a statement made on motion for a new trial in an insolvent case.[154]

§ 1818. Settlement, effect of.—The supreme court can only look to the statement as settled by the court below, to determine the character and the point of the objection made on the trial to the introduction of proposed evidence. They cannot consult the opinion of the judge in passing upon the motion for a new trial to discover the real point of objection.[155] A case as settled is deemed to contain a true statement of the facts as

147 Phelps v. McDonald, 26 N. Y. 82; Bissell v. Pierce, 28 N. Y. 252.

148 Kavanagh v. Maus, 28 Cal. 261; Cosgrove v. Johnson, 30 Cal. 509; Burnett v. Pacheco, 27 Cal. 408. As to settlement of statement of facts under statutes of Washington, see Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; Oliver v. Lewis, 9 Wash. 572, 38 Pac. 139; Bowen v. Cain, 7 Wash. 469, 35 Pac. 369; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Watt v. O'Brien, 6 Wash. 415, 33 Pac. 969; In re Rosner, 5 Wash. 488, 32 Pac. 106; Snyder v. Kelso, 3 Wash. 181, 28 Pac. 335; King County v. Hill, 1 Wash. 63, 23 Pac. 926; Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010.

149 Gunderson v. Cochrane, 3 Wash. 476, 28 Pac. 1105; Faulconer v. Warner, 2 Wash. 525, 27 Pac. 274; Coats v. West Coast etc. Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

150 Cadwell v. First Nat. Bank, 3 Wash. 188, 28 Pac. 365.

151 Fielden v. Lahens, 14 Abb. Pr. 48.

152 Reid v. Rensselaer Glass Factory, 3 Cow. 387; Feeter v. Heath, 11 Wend. 479; Melvin v. Leacraft, 17 Wend. 169; People v. Superior Court, 20 Wend. 663; Esterly v. Cole, 3 N. Y. 502. As to settlement of statement under Nevada statutes, see James v. Leport, 19 Nev. 174, 8 Pac. 47; Patchen v. Keeley, 19 Nev. 405, 14 Pac. 347.

153 Morse v. Evans, 6 How. Pr. 445. But see Cal. Code Civ. Proc., § 653.

154 People v. Rosborough, 29 Cal. 415.

155 Cochran v. O'Keefe, 34 Cal. 557.

found.[156] A recital in a judgment that certain parties appeared is conclusive on appeal.[157] On appeal from an order granting or denying a new trial, there is no necessity for preparing a statement on appeal, the statement on motion for new trial being sufficient.[158] A statement when agreed on by the parties should not probably be amended, except under a very clear showing of mistake or fraud.[159]

§ 1819. Special proceedings.—The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal.[160] In contested election cases, where the appellant assigns as error the improper rejection by the court below of the votes cast in his favor, and a statement is made part of the record, it is competent for the respondent, by way of amendment thereto, to incorporate in the statement the fact that other votes cast for him were likewise erroneously rejected by the court below.[161]

§ 1820. Stipulation of attorneys.—Where counsel in a cause pending in the supreme court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation.[162]

§ 1821. Time for settlement.—Statements and exceptions should be speedily settled.[163] A case should be presented for

156 Hartman v. Proudfit, 6 Bosw. 191.

157 In re Pendergast's Estate, 143 Cal. 135, 76 Pac. 962; Griffith v. Maxwell, 25 Wash. 658, 66 Pac. 106.

158 Loucks v. Edmondson, 18 Cal. 203. As to settlement of statement on motion for new trial, see Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124; Henry v. Merguire, 106 Cal. 142, 39 Pac. 599; Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

159 Hutchinson v. Bours, 13 Cal. 50.

160 Central Pacific R. R. Co. v. Placer Co., 32 Cal. 582.

161 Webster v. Byrnes, 34 Cal. 273. That election contests are not to be tried de novo on appeal, see Hughes v. Holman, 23 Or. 481, 32 Pac. 298. See, also, Fenstermacher v. State, 19 Or. 508, 25 Pac. 142.

162 Cahoon v. Levy, 10 Cal. 216.

163 Hutchinson v. Bours, 13 Cal. 50.

settlement without unnecessary delay.[164] The bill of exceptions must be settled in time, or it will be stricken from the record.[165]

Where no order was made fixing the time for settlement of the statement, and no amendments were proposed to the statement within the time limited by law, and before the expiration of the thirty days prescribed by the statute, an application was granted, on notice, to extend the time, and the statement was filed and served within the time as extended, it will be presumed that the court's action in subsequently certifying the same was warranted.[166]

§ 1822. Appeal from the judgment-roll.—When there is no statement on appeal, it stands on the judgment-roll[167] as on a denial of a motion for a new trial.[168] And in case of the denial of a motion for a new trial on the appeal from the judgment, the statement on motion for a new trial forms part of the record,[169] and may be used on an appeal from the order.[170] An appeal may be taken from the judgment of the superior court without moving for a new trial in that court.[171] But on an appeal from a judgment without a statement, nothing belongs to the record except the judgment-roll, and no question arising outside of the roll can be considered.[172] If a judgment by default was entered on a demurrer overruled, and the judgment-roll did not disclose what action was taken on the demurrer, the presumption is that the proceedings were regular.[173] When the only error assigned is the judgment of dismissal of a complaint, which is substantially the sustaining of a demurrer thereto, there is no necessity for a

164 Whiting v. Kimball, 6 Bosw. 690. As to time for settlement of statement, see Patchen v. Keeley, 19 Nev. 404, 14 Pac. 347; Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411; McGlauflin v. Merriam, 7 Wash. 111, 34 Pac. 561; Bartlett v. Reichenecker, 6 Wash. 168, 32 Pac. 1062; Cogswell v. West etc. Ry. Co., 5 Wash. 46, 31 Pac. 411.

165 Crowley v. McDonough, 30 Wash. 57, 70 Pac. 261.

166 O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 692.

167 American River Water etc. Co. v. Bear River Water etc. Co., 11 Cal. 340; McGill v. Rainaldi, 11 Cal. 391; Newberg v. Henson, 12 Cal. 280.

168 Burdge v. Gold Hill etc. Water Co., 15 Cal. 198; McIntyre v. Willis, 20 Cal. 177.

169 Solomon v. Reese, 34 Cal. 28; Towdy v. Ellis, 22 Cal. 651; Carpentier v. Williamson, 25 Cal. 154.

170 Casgrave v. Howland, 24 Cal. 457; Walden v. Murdock, 23 Cal. 540, 83 Am. Dec. 135. See Cal. Code Civ. Proc., § 950.

171 Innis v. Steamer Senator, 1 Cal. 459, 54 Am. Dec. 305.

172 Wetherbee v. Carroll, 33 Cal. 549.

173 Abadie v. Carrillo, 32 Cal. 172.

bill of exceptions.[174] On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.[175] The appeal may be heard on the record, consisting of the order appealed from, and the affidavits identified in the mode prescribed by law.[176] Where the evidence is not set out in a statement on appeal, the court will presume that the court below had good reason for granting a new trial.[177] One who alleges error must rely on the record to disclose it,[178] as error will not be presumed.[179] Every intendment is in favor of a decision of the court below.[180] But where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on respondent to see that the record discloses the fact that appellant has not been so prejudiced.[181] Where the court tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them and note the refusal in a bill of exceptions.[182] To make an exception available, it must appear that the precise question intended to be raised was brought to the attention of the court below.[183]

174 Long v. Billings, 7 Wash. 267, 34 Pac. 936.

175 Cal. Code Civ. Proc., § 951.

176 Wetherbee v. Carroll, 33 Cal. 554.

177 Dickinson v. Van Horn, 9 Cal. 207.

178 Waldie v. Doll, 29 Cal. 555.

179 Dimick v. Campbell, 31 Cal. 238.

180 Landers v. Bolton, 26 Cal. 393; People v. Quincy, 8 Cal. 89; De Johnson v. Sepulveda, 5 Cal. 149.

181 Norwood v. Kenfield, 30 Cal. 393; Jackson v. Feather River Water Co., 14 Cal. 18.

182 Griswold v. Sharpe, 2 Cal. 17.

183 Walsh v. Washington Ins. Co., 32 N. Y. 427.

CHAPTER LXV.

BILL OF EXCEPTIONS.

§ 1823. Bill of exceptions.—An appeal can be heard on a bill of exceptions taken at the trial if signed by the judge.[1] A bill of exceptions duly settled becomes a part of the judgment-roll on appeal from a final judgment.[2] Appellant may have questions of law reviewed by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions,[3] and only such orders and rulings as the appellant desires to have reviewed.[4] The supreme court of Nevada has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal. The exceptions to the ruling of the court below will be treated as a substitute.[5] In the statute a statement and a bill of exceptions on this subject mean the same thing.[6] An appeal from the judgment only brings under review such rulings on the trial as are duly excepted to.[7] In the absence of a bill of exceptions, an order refusing to settle a bill of exceptions, even if erroneous, cannot be shown to be erroneous.[8] Matters not apparent of record, to be considered, must be incorporated in the bill of exceptions.[9] Where no bill of exceptions has been filed, a judgment of the court below will not be disturbed for errors

1 De Johnson v. Sepulveda, 5 Cal. 149.

2 Cal. Code Civ. Proc., § 950; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907.

3 Hunt v. Bloomer, 13 N. Y. 341, 344; Harper v. Minor, 27 Cal. 107; Treadwell v. Davis, 34 Cal. 604, 94 Am. Dec. 770; Gates v. Walker, 35 Cal. 289.

4 Harper v. Minor, 27 Cal. 107.

5 Gillig v. Lake Bigler Road Co., 2 Nev. 214.

6 People v. Lee, 14 Cal. 510.

7 Letter v. Putney, 7 Cal. 423; Castro v. Gill, 5 Cal. 42; Keyes v. Devlin, 3 E. D. Smith, 518; Gelston v. Hoyt, 13 Johns. 561; Coon v. Syracuse & Utica R. R. Co., 5 N. Y. 492; Franklin v. Osgood, 14 Johns. 527. For the principles on which the above rule is founded, see Sands v. Hildreth, 12 Johns. 493; Ketchum v. Evartson, 13 Johns. 361; Henry v. Cuyler, 11 Johns. 469; Colden v. Knickerbacker, 2 Cow. 31; Campbell v. Stakes, 2 Wend. 146; Houghton v. Starr, 4 Wend. 179; Wood v. Young, 5 Wend. 620.

8 Williamson v. Joyce, 137 Cal. 151, 69 Pac. 980.

9 Matteson v. Southern Pacific Co., 6 Cal. App. 318, 92 Pac. 101.

not apparent upon the record.[10] A mere abstract of the record cannot supply the absence of a bill of exceptions.[11] Where the ruling of the court appears on the record, a bill of exceptions is unnecessary.[12] And on an appeal made upon affidavits, or other written evidence, certified as the statute provides, no bill of exceptions is necessary.[13] Orders extending the time for preparation of the statement or bill of exceptions are not a necessary part of the record on appeal.[14]

§ 1824. **The same—Continued.**—An exception is a formal protest against the ruling of the court upon a question of law. And a bill of exceptions is a statement in writing, settled and signed by the judge, of what the ruling was, the facts in view of which it was made, and the protest of counsel;[15] there is no difference between a statement and bill of exceptions in form or substance, except that the former follows a notice of motion for a new trial.[16] In the Idaho practice, a bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a "statement."[17] In the California practice, a bill of exceptions is equally applicable to any and all kinds of appeals provided for by the code, and is to be preferred in practice to a statement of the case.[18] A bill of exceptions, duly signed and sealed by the judge, and made a part of the record by his order, is a condition precedent to the right to ask a review of the judgment as to any question of fact.[19] When it is desired to attack a judgment because it has been rendered upon improper or insufficient testimony, or because the jury was not sufficiently and accurately instructed, it is indispensable that

10 Scott v. Cook, 1 Or. 24.

11 Edwards v. Simms, 8 Ariz. 261, 71 Pac. 902.

12 People v. Maguire, 26 Cal. 635; Cunningham v. Wheatley, 21 Tex. 184; State v. Mack, 20 Or. 234, 25 Pac. 639.

13 Bailey v. Scott, 1 S. Dak. 337, 47 N. W. 286; Pieper v. Land Co., 56 Cal. 173.

14 Steve v. Bonner's Ferry Lumber Co., 13 Idaho, 384, 92 Pac. 363.

15 People v. Torres, 38 Cal. 141. See, as to object of bill of exceptions, State v. Drake, 11 Or. 396, 4 Pac. 1204.

16 People v. Crane, 60 Cal. 279. But see Roundtree v. Galveston, 42 Tex. 623.

17 Schultz v. Keeler, 2 Idaho, 333, 13 Pac. 481; United States v. Alexander, 2 Idaho, 386, 17 Pac. 746. See Puget Sound Iron Co. v. Worthington, 2 Wash. T. 472, 7 Pac. 882, 886.

18 Brandt v. Clarke, 81 Cal. 634, 22 Pac. 863.

19 Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. 891; Burnell v. Wachtel, 4 Colo. App. 556, 36 Pac. 887; Kimmins v. Lord, 1 Colo. App. 221, 28 Pac. 20; Beifeld v. Martin, 4 Colo. App. 578, 37 Pac. 32; Richardson v. Dunlap, 26 Or. 270, 38 Pac. 1.

the evidence be preserved by a bill of exceptions.[20] If no exception to the judgment appealed from nor to any ruling or decision of the court below is preserved, the record does not present anything which can be the subject of review.[21] In other words, until such matter as constitutes no part of the record proper is put into a bill of exceptions, and is authenticated as required by law, the court cannot receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings.[22] The stipulation of counsel that the testimony as taken by the court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified.[23]

§ 1825. Statement as bill of exceptions.—A statement on motion for new trial may be used as a bill of exceptions on appeal from the judgment, on such questions as are authorized to be heard on such appeal, whether the statement was used on a motion for new trial or not.[24]

§ 1826. When bill of exceptions not necessary.—A bill of exceptions need not be taken to a decision overruling a demurrer to a pleading.[25] In Idaho, certain decisions and orders are, by statute, deemed to have been excepted to, and such exceptions need not be embodied in a bill of exceptions, being reviewed from the record or files as though settled in a bill.[26]

It is not necessary to assign the overruling of a motion for a new trial as error, unless it is desired to have reviewed all matters embraced therein without further assignment.[27]

20 Hammond v. Bovee, 4 Colo. App. 269, 35 Pac. 674. See, also, First Nat. Bank v. Leppel, 9 Colo. 594, 13 Pac. 776; Rocky Mountain Nat. Bank v. McCaskill, 16 Colo. 408, 26 Pac. 821; Rutter v. Shumway, 16 Colo. 95, 26 Pac. 321; Patrick v. Weston, 21 Colo. 73, 39 Pac. 1083.

21 Id.; Estate of Smiley, 4 Colo. App. 582, 36 Pac. 894; Burnell v. Wachtel, 4 Colo. App. 556, 36 Pac. 887; Bonnell v. Gill, 41 Colo. 59, 92 Pac. 13; Newton v. Cardwell etc., 41 Colo. 492, 92 Pac. 914; Ferdig v. Simpson, 47 Wash. 475, 92 Pac. 370.

22 State v. Drake, 11 Or. 396, 4 Pac. 1204; State v. Chee Gong, 17 Or. 635, 21 Pac. 882. See State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

23 McKenzie v. Ballard, 14 Colo. 426, 24 Pac. 1. See Janeway v. Holston, 19 Or. 97, 23 Pac. 850; McQuaid v. Portland etc. R. R. Co., 19 Or. 535, 25 Pac. 26.

24 Idaho Rev. Codes, § 4818; Steve v. Bonner's Ferry Lumber Co., 13 Idaho, 384, 92 Pac. 363.

25 Malley Co. v. Londoner, 41 Colo. 436, 93 Pac. 488.

26 Idaho Rev. Codes, § 4427; Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962.

27 Riorden v. Horton, 16 Wyo. 363, 94 Pac. 448.

In 1907, the California legislature provided an alternative method of taking appeal, and of preparing the record on appeal, by which a typewritten transcript of the evidence and proceedings of trial in the lower court take the place of a bill of exceptions. By this new method the only record of the trial that is printed is just such parts as are referred to in the printed briefs, and then it is printed either within the brief or a supplement thereto attached.[28]

§ 1827. What a bill of exceptions should contain.—Documents and affidavits to be reviewed by the appellate court must be embodied in a bill of exceptions or record.[29] The evidence taken before a referee can only be available by incorporating it in a bill of exceptions, and having the referee allow and sign the same.[30] To review a motion for dismissal, the motion and exception to the ruling had thereon must be preserved by the bill of exceptions.[31] It must contain a record of the attachment suit upon which the garnishment proceedings in question are based.[32] Writings, if not embodied in a bill of exceptions, should be unmistakably marked or identified, so as to leave no doubt as to what is referred to,[33] as affidavits in support of a motion,[34] or affidavits as to incompetency of a juror.[35] Affidavits used on motion to open the judgment form no part of the record, where there is no certificate of the clerk or admission of counsel that they were used for that purpose.[36] And to review intermediate orders on an appeal from the final judgment, such orders must be made a part of the record by a bill of exceptions.[37] An order striking out a statement on motion for a new trial cannot be brought before the supreme court by a bill of exceptions.[38]

28 Cal. Code Civ. Proc., §§ 953a-953c; Stats. 1907, p. 750.

29 Gates v. Buckingham, 4 Cal. 286; Ritter v. Mason, 11 Cal. 214; Moore v. Semple, 11 Cal. 360; Los Angeles Nat. Bank v. Chandler, 6 Cal. App. xiii, 92 Pac. 872; Nelson Bennett Co. v. Twin Falls Land etc. Co., 14 Idaho, 5, 93 Pac. 789.

30 Howe v. City of Hobart, 18 Okla. 243, 90 Pac. 431.

31 Stephens v. Moore, 40 Colo. 306, 90 Pac. 853; Hafey v. Ballin, 40 Colo. 251, 90 Pac. 853; Masoner v. Bell, 20 Okla. 618, 95 Pac. 239.

32 Caldwell Banking etc. Co. v. Porter (Or.), 97 Pac. 541.

33 Lyons v. Thompson, 16 Iowa, 62.

34 People v. Honshell, 10 Cal. 83; People v. Martin, 32 Cal. 92; Harman v. State, 22 Ind. 331.

35 People v. Honshell, 10 Cal. 86; affirming People v. Stonecifer, 6 Cal. 411.

36 Ritter v. Mason, 11 Cal. 214.

37 Cornell v. Davis, 16 Wis. 686.

38 Quivey v. Gambert, 32 Cal. 304. See Calderwood v. Peyser, 42 Cal. 110.

It is not necessary to embody matter of record in a bill of exceptions.[39] A bill of exceptions stating "that thereupon plaintiff filed his certain motion, with affidavits attached, to set aside said verdict," does not refer to the affidavits so as to make them part of the record.[40] The date of the actual physical annexation of an exhibit to the bill is immaterial where it has been sufficiently marked and indorsed for identification.[41] If a bill of exceptions made to an order dismissing a motion for a new trial recites the giving of a notice and the different steps taken in prosecuting the motion, it will be received as evidence of the facts recited, without including notice, statement, etc., in the transcript.[42]

§ 1828. The same—Continued.—Any matter *dehors* the record relied on to destroy the presumptions in favor of the judgment, upon an appeal therefrom, must be embodied in a bill of exceptions.[43] As a rule, the bill should make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish.[44] No more of the testimony should be given than is necessary to explain the objection to be urged on appeal.[45] But in some instances it may be necessary to state the evidence by question and answer in order to lay before the court the exact statement of the witness, even though it may not be desired to point an exception, and it must be left largely to the discretion of the trial judge when settling the bill to determine the proper method to be pursued in any given case.[46] The appellant must make up his record so as to clearly show the basis for his points; and it is not sufficient that an objection by counsel at the trial recites certain facts.[47] A bill of exceptions which does not make

39 De Johnson v. Sepulveda, 5 Cal. 149.

40 Moffit v. Rogers, 15 Iowa, 453; Bruce v. Casey-Swasey Co., 13 Okla. 554, 75 Pac. 280.

41 Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071.

42 Warden v. Mendocino County, 32 Cal. 655.

43 Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; United Land Assoc. v. Pacific Improvement Co., 139 Cal. 370, 69 Pac. 1004, 72 Pac. 988; Shropshire v. Sidebottom,, 30 Mont. 406, 76 Pac. 941; Chevalier v. Wilson, 30 Wash. 227, 70 Pac. 487; Atchison v. Arnold, 11 Wyo. 351, 72 Pac. 190, 73 Pac. 964.

44 Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101. See Tucker v. Salem etc. Mills Co., 15 Or. 581, 16 Pac. 426; State v. Clements, 15 Or. 237, 14 Pac. 410; Hamilton v. Gordon, 22 Or. 557, 30 Pac. 495.

45 Fiore v. Ladd, 22 Or. 202, 29 Pac. 435.

46 Cohen v. Wallace, 107 Cal. 133, 40 Pac. 101.

47 Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; Davis v. Baker, 88 Cal. 106, 25 Pac. 1108.

a record of what actually happened upon the trial of the cause, but of what merely occurred on the hearing of a motion for a new trial, is not entitled to consideration.[48] But a statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either.[49] A bill reciting, "The following testimony was taken before the referee [clerk will here insert the testimony]," is insufficient.[50] It was held that a paper attached to a bill of exceptions, and marked as an exhibit thereto, is not a part of the bill, and that the bill cannot be aided by it.[51] But a bill of exceptions is to be read in connection with the record of which it forms a part, and a document set out in another part of the record, which is sufficiently identified as the one referred to in the bill of exceptions, may be deemed a part of it, and be considered in passing upon the merits of an exception reserved by such bill.[52] An exception is not preserved by a journal entry.[53] Errors of law occurring on the trial may be reviewed, although no specification of the particular errors of law on which the appellant relies is contained in the bill of exceptions.[54] Irrelevant matters incorporated into a bill of exceptions will not be considered upon the appeal.[55]

§ 1829. **Filing and settlement of bill of exceptions.**—Bills of exceptions made during the progress of the trial should be written down, settled and signed by the judge, filed in the case, and be annexed to the judgment-roll.[56] A bill of exceptions may be filed by the judge at his own instance, and will in such case become a part of the record.[57] A bill of exceptions cannot be filed by the judge after the time given, at least not without the

48 Waite v. Stroud, 9 Wash. 333, 37 Pac. 324. See Goose River Bank v. Gilmore, 3 N. Dak. 188, 54 N. W. 1032.

49 Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381.

50 State v. Napton, 28 Mont. 336, 72 Pac. 676.

51 France v. First Nat. Bank, 3 Wyo. 187, 18 Pac. 748.

52 People v. Wallace, 94 Cal. 497, 29 Pac. 950; Oregonian Ry. Co. v. Wright, 10 Or. 162; Caspary v. Portland, 19 Or. 500, 20 Am. St. Rep. 844, 24 Pac. 1036.

53 Cochrane v. Mining Co., 4 Colo. App. 235, 35 Pac. 752; German Nat. Bank v. Elwood, 16 Colo. 244, 27 Pac. 705.

54 Reay v. Butler, 69 Cal. 572, 11 Pac. 463; Hagman v. Williams, 88 Cal. 146, 25 Pac. 1111. See Bridal Veil Lumber Co. v. Johnson, 25 Or. 105, 34 Pac. 1026.

55 Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

56 More v. Del Valle, 28 Cal. 170; People v. Empire Gold etc. Min. Co., 33 Cal. 173; Wetherbee v. Carroll, 33 Cal. 553.

57 Shepherd v. Brenton, 15 Iowa, 84.

consent of all parties.[58] The fact that a bill of exceptions was not signed until more than ten days after the trial cannot defeat a party's right to appeal.[59] When a bill of exceptions on appeal from a judgment has been settled more than forty days without filing of a transcript, the appellant is in default.[60] A certificate of the judge, made eight years after the trial, that he believed the exceptions were correctly noted in the clerk's minutes of testimony, cannot supply the place of a bill of exceptions.[61] When it appears from the bill of exceptions, signed by the judge, that the motion for new trial was heard on statement, counter-statement, and affidavits, it cannot be objected that the statement was not settled.[62] Though the time has expired and no bill of exceptions to an order confirming a sale has been proposed or settled, the supreme court has no authority to declare the appeal to be without merit;[63] but it may dismiss the appeal.[64] A bill of exceptions taken during the trial is a part of the judgment-roll.[65] Bills of exceptions settled after trial and judgment, though not technically a part of the judgment-roll, are filed by the clerk, and become part of the record on appeal.[66]

The allowance of a bill of exceptions after the close of the term at which the judgment was rendered, no order having been made enlarging the time for its presentation, is discretionary.[67]

§ 1830. Jurisdiction.—The settlement of a bill of exceptions is a proceeding in an action.[68] And the duty and power of settling statements and bills of exceptions rest generally and properly in the judge of the trial court, and the appellate court will not interfere with such statement or bill except in the case of a refusal by the judge to allow an exception.[69] Under the statute of South Dakota,[69a] when the death, disqualification, or

58 Swinney v. Nave, 22 Ind. 178.

59 People v. Martin, 6 Cal. 477.

60 Bell v. Southern Pacific R. R. Co., 137 Cal. 77, 69 Pac. 692.

61 Castro's Exrs. v. Armesti, 14 Cal. 38.

62 Williams v. Gregory, 9 Cal. 76.

63 Gordon v. Graham, 153 Cal. 297, 95 Pac. 145.

64 Smith v. American Falls C. & P. Co., 15 Idaho, 89, 95 Pac. 1059.

65 Cal. Code Civ. Proc., § 670.

66 Cal. Code Civ. Proc., § 950.

67 Hayes v. Clifford, 42 Or. 568, 72 Pac. 1. But see Cantlin v. Miller, 13 Wyo. 109, 78 Pac. 295.

68 Lukes v. Logan, 66 Cal. 33, 4 Pac. 883; Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332.

69 Colbert v. Rankin, 72 Cal. 197, 13 Pac. 491; Stratton v. California etc. Timber Co., 86 Cal. 353, 24 Pac. 1065; In re Gates, 90 Cal. 257, 27 Pac. 195; Hyde v. Boyle, 89 Cal. 590, 26 Pac. 1092. See In re Moore, 78 Cal. 242, 20 Pac. 558; Wheeler v. Fick, 4 N. Mex. 36 (14), 12 Pac. 625.

69a Comp. Laws, § 5068.

absence of the trial judge is shown to exist, it is the duty of the appellate court to direct some manner in which a bill may be settled, and this will generally be done by authorizing some other judge to act in the matter.[70] And the legislature cannot enjoin upon a private citizen the duty of settling a bill of exceptions, nor require a judge to continue to discharge judicial duties after his term of office has expired, though it may authorize him to settle such bill.[71] But a statute empowering a judge to settle a bill after he ceases to be such judge is not unconstitutional.[72] *Mandamus* will lie to compel the settlement of a bill of exceptions prepared in time, which the judge has improperly refused to settle.[73] A writ of mandate lies to compel a referee to settle a statement on motion for a new trial in an action tried by him.[74]

§ 1831. Notice—Time of settlement.—The Montana statute[74a] requires notice to the adverse party of the presentation and settlement of a bill of exceptions.[75] So in California, under section 650 of the Code of Civil Procedure, a bill of exceptions prepared and settled after the trial must be prepared and served on the adverse party or counsel, who may offer amendments, and thereafter the bill is settled by the judge, on notice to the parties.[76] The notice provided for in this section of the code is for the benefit of the adverse party, and may be waived by him.[77] Under the Oregon practice, a bill of exceptions should be tendered to the judge immediately after the trial, unless the time therefor is extended; but the settlement and allowance thereof may be

70 Severson v. Insurance Co., 3 S. Dak. 412, 53 N. W. 860.

71 Leach v. Aitken, 91 Cal. 484, 28 Pac. 777.

72 Miller & Lux v. Enterprise etc. Co., 142 Cal. 208, 100 Am. St. Rep. 115, 75 Pac. 770.

73 Sansome v. Myers, 80 Cal. 483, 22 Pac. 212; Hicks v. Masten, 101 Cal. 651, 36 Pac. 130; Flagg v. Puterbaugh, 101 Cal. 583, 36 Pac. 95; Leach v. Pierce, 93 Cal. 624, 29 Pac. 238; Che Gong v. Stearns, 16 Or. 219, 17 Pac. 871. As to when mandamus will not lie, see People v. Sullivan, 61 Cal. 233; Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547; Pacific Land Assoc. v. Hunt, 105 Cal. 202, 38 Pac. 635.

74 Careaga v. Fernald, 66 Cal. 351, 5 Pac. 615. And see State v. Murphy, 19 Nev. 89, 6 Pac. 840. As to sufficiency of petition for writ of mandate to compel settlement of bill of exceptions, see Walkerley v. Greene, 104 Cal. 208, 37 Pac. 890; Landers v. Lawler, 84 Cal. 547, 24 Pac. 307; Anschlag v. Superior Court, 76 Cal. 513, 18 Pac. 676; Williard v. Dillard, 86 Cal. 154, 24 Pac. 940.

74a Laws Extra Sess. 1887, p. 82, § 5.

75 See McKay v. Montana etc. Ry. Co., 13 Mont. 15, 31 Pac. 999.

76 See Kelleher v. Creciat, 89 Cal. 38, 26 Pac. 619; Hyde v. Boyle, 93 Cal. 1, 29 Pac. 247.

77 Hicks v. Masten, 101 Cal. 651, 36 Pac. 130.

made at any reasonable time thereafter, according to the convenience of the judge.[78] The appellate court will not refuse to consider a bill of exceptions on the ground that it was not settled in time, unless it affirmatively appears from the record that the bill was not presented in time, or that the regular steps were not taken for its settlement.[79] Though the day fixed in plaintiff's notice for presentation was a day later than provided by statute, a settlement was not improper, where the mistake was the result of excusable inadvertence of counsel.[80] The bill may be settled after an appeal has been taken.[81] In some jurisdictions provision is made for extension of time to settle bills of exception.[82] And an order made after statutory time has expired, settling a statement or bill, operates to extend the time for such settlement to the date thereof.[83] Such order may be *ex parte*.[84] An agreement of parties appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial.[85] The judge has no authority to settle a bill of exceptions prepared and served after the expiration of the time limited by his admission to prepare and serve a proper draft in lieu of a previous skeleton bill, in the absence of a legal excuse for the neglect, and his action in refusing to settle such bill is correct.[86] The appellate court will not, on motion for dismissal, determine whether a proposed bill has been served in time when its settlement is pending in the lower court.[87]

78 Ah Lep v. Gong Choy, 13 Or. 205, 9 Pac. 483. See Holcomb v. Teal, 4 Or. 352.

79 Reay v. Butler, 69 Cal. 572, 11 Pac. 463. See Jaffe v. Lilienthal, 101 Cal. 175, 35 Pac. 636.

80 Kaltschmidt v. Weber, 145 Cal. 596, 79 Pac. 272.

81 Reay v. Butler, 69 Cal. 572, 11 Pac. 463.

82 See Moe v. Northern Pacific R. R. Co., 2 N. Dak. 282, 50 N. W. 715; Roy v. Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

83 Edwards etc. Lumber Co. v. Baker, 2 N. Dak. 289, 50 N. W. 718; Olson v. Oregon Short Line Co., 24 Utah, 460, 68 Pac. 148.

84 Johnson v. Northern Pacific R. R. Co., 1 N. Dak. 354, 48 N. W. 227. Contra: Taylor v. Derry, 4 Colo. App. 109, 35 Pac. 60. Compare Greig v. Clement, 20 Colo. 167, 37 Pac. 960.

85 Sebree v. Smith, 2 Idaho, 359, 16 Pac. 915. See Lockhart v. Rollins, 2 Idaho, 540, 21 Pac. 413.

86 Visher v. Smith, 92 Cal. 60, 28 Pac. 94. See Stonesifer v. Armstrong, 86 Cal. 594, 25 Pac. 50; Bunnel v. Stockton, 83 Cal. 319, 23 Pac. 301. As to time of settling and signing bill of exceptions under statute of New Mexico, see Texas etc. R. R. Co. v. Saxton, 3 N. Mex. 282 (443), 6 Pac. 206; Evans v. Baggs, 4 N. Mex. 147 (67), 13 Pac. 207; Jennison v. Boos, 4 N. Mex. 157 (71), 13 Pac. 230.

87 Dernham v. Bagley, 151 Cal. 216, 90 Pac. 543.

§ 1832. Signing—Authentication.—A draught of a bill of exceptions must be authenticated by the signature or indorsement of the attorney presenting it, or of the party, if he appears in person. And unless such draught shows that it is one prepared and presented by a party to the cause, it need not be noticed as a paper upon which the judge or any of the counsel in the cause are called upon to act.[88] Under the Colorado practice, bills of exception must be signed and sealed by the judge whose rulings are excepted to.[89] And a bill of exceptions cannot be preserved by affidavits, except in a case where, upon the presentation of a true bill, the judge "shall neglect or refuse to allow and sign and seal the same."[90] The trial judge, by signing a bill of exceptions, in effect certifies as correct every material statement thereof, except as modified by his certificate.[91] It is the certificate of the judge that identifies the motion for new trial contained in the bill of exceptions as the motion ruled upon, and the certificate of the clerk neither adds to nor detracts from the recitals contained in the bill.[92] Generally, the copies of papers to be used on appeal may be certified or identified by the clerk or by stipulation of the attorneys.[93]

§ 1833. The same—Petition to prove.—Section 652 of the California Code of Civil Procedure provides for a petition to the supreme court to prove an exception which the judge has refused to allow in accordance with the fact. But this provision does not confer upon the supreme court power to settle the bill or statement, and has no application, except where the judge has refused to allow an exception which he had the power to allow.[94]

88 Landers v. Lawler, 84 Cal. 547, 24 Pac. 307. See Houghton v. Trumbo, 103 Cal. 239, 37 Pac. 152.

89 Feichheimer v. Trounstiene, 12 Colo. 282, 20 Pac. 704; Reed v. Cates, 11 Colo. 527, 19 Pac. 464; Hammond v. Bovee, 4 Colo. App. 269, 35 Pac. 674; Pelton v. Bauer, 4 Colo. App. 339, 35 Pac. 918; Marshall etc. Min. Co. v. Kirtley, 8 Colo. 108, 5 Pac. 649. See Chicago etc. Railroad Co. v. Marseilles, 107 Ill. 313.

90 Diamond etc. Min. Co. v. Faulkner, 17 Colo. 9, 28 Pac. 472. As to necessity of authentication of bill of exceptions, see Howard v. Bowman, 3 Wyo. 311, 23 Pac. 68. As to signing by judge in vacation, see McBride v. Union Pacific Ry. Co., 3 Wyo. 183, 18 Pac. 635. No statute in Oregon fixes the time within which a judge may sign a bill of exceptions. Che Gong v. Stearns, 16 Or. 219, 17 Pac. 871.

91 York v. Nash, 42 Or. 321, 71 Pac. 59.

92 Weidenhoft v. Primm, 16 Wyo. 340, 94 Pac. 453.

93 Hall v. Jensen, 14 Idaho, 165, 93 Pac. 962.

94 Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500; Tibbets v.

But it seems that the right to prove an exception involves the right, when necessary, to prove upon what the exception was based.[95] In an application to the supreme court under this section, the petition should set forth the exceptions taken and the evidence in support thereof, and notice of the application should be given to the trial judge.[96]

Where a trial judge refused to settle a bill of exceptions, and it did not appear that the opposite party was given due notice that the document would be sought to be preserved by affidavits, the bill cannot be so preserved.[97]

§ 1834. The same—Amending the bill.—A bill of exceptions on which a motion for a new trial was heard cannot be amended, on an appeal from the order denying the motion, by inserting matters therein which the trial judge certifies he intended should be, and supposed were, included,[98] unless such application for amendment is made within six months from the date the judge signed and settled such bill of exceptions.[99]

§ 1835. The same—Presumptions.—Where the record on appeal does not show a settlement of the bill of exceptions, such fact will nevertheless be presumed from the signature of the trial judge thereto attached.[100] In an application to the supreme court, under the statute, to settle a bill of exceptions, on the ground that the trial judge refuses to settle the same in accordance with the facts, every presumption is in favor of the correctness of the bill as settled by the trial judge, and it will stand, unless the attacking party affirmatively shows its incorrectness.[101] So when the court refuses to give a charge requested, and the bill of exceptions does not contain the charge given by the court, nor any exception thereto, the presumption is that the court correctly

Riverside Banking Co., 97 Cal. 258, 32 Pac. 174; Hyde v. Thornton, 83 Cal. 83, 23 Pac. 126.

95 Jennings v. Brown, 109 Cal. 290, 41 Pac. 1085. See Vance v. Superior Court, 87 Cal. 390, 25 Pac. 500.

96 Estate of Hawes, 68 Cal. 413, 9 Pac. 456; Landers v. Landers, 82 Cal. 480, 23 Pac. 126; Estate of Biddel, 75 Cal. 229, 19 Pac. 181. As to when the application will be denied, see Crow v. Minor, 85 Cal. 214, 24 Pac. 640; People v. Scott, 91 Cal. 563, 27 Pac. 930.

97 Froman v. Wilson, 20 Colo. App. 297, 78 Pac. 615.

98 Merced Bank v. Price, 152 Cal. 697, 93 Pac. 866.

99 Id.; Cal. Code Civ. Proc., § 473.

100 State v. Campbell, 20 Nev. 122, 17 Pac. 620.

101 Baird v. Gleckler, 3 S. Dak. 300, 52 N. W. 1097. See Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612.

charged the jury, and that such charge covered the ground of the instruction requested.[102] Contempt proceedings will be presumed to be supported by the evidence, in absence of a bill of exceptions making such evidence a part of the record.[103]

§ 1836. **The same—Striking from files.**—A bill of exceptions not settled as provided by the statute will be stricken from the files.[104] But it is held that a bill of exceptions, although merely a transcript of the stenographer's notes and containing much immaterial matter, will not be stricken out, when it was allowed as a bill of exceptions without objection, and the error, if any, to be reviewed is the granting of a nonsuit.[105] In the absence of an authenticated record as to the affidavits used on a motion for a new trial for newly discovered evidence, the order granting the motion cannot be reviewed.[106] Orders, stipulations, and an oath and account of a receiver in the transcript, not being authenticated, cannot be considered on appeal, being no part of the judgment-roll.[107] And a record on appeal, authenticated by the judge instead of the clerk, is a nullity.[108]

§ 1837. **Exceptions to evidence.**—An exception to admission of evidence, stating no grounds, will not be considered.[109] The particulars in which the evidence failed to support the findings and judgment must be made a part of the bill of exceptions.[110] In a trial by the court the bill of exceptions must show what evidence was given on the trial, and the exceptions taken to the finding.[111] Exceptions will not be sustained which simply show

102 Flint v. Nelson, 10 Utah, 261, 37 Pac. 479.

103 Raphael v. Wasatch etc. R. R. Co., 34 Utah, 97, 95 Pac. 1008.

104 Montana etc. Produce Co. v. Howard, 10 Mont. 296, 25 Pac. 1024.

105 Johnston v. Oregon etc. Ry. Co., 23 Or. 94, 31 Pac. 283; distinguishing Eaton v. Oregon etc. Nav. Co., 22 Or. 497, 30 Pac. 311.

106 Esert v. Glock, 137 Cal. 533, 70 Pac. 479.

107 O'Neil v. McLennan (Cal), 73 Pac. 576.

108 Bowling v. Chambers, 20 Colo. App. 113, 77 Pac. 16; Shadville v. Barker, 26 Mont. 45, 66 Pac. 496, 761; Wade v. Mitchell, 14 Okla. 168, 79 Pac. 95; Board of Commissioners v. Shaffner, 10 Wyo. 181, 68 Pac. 14.

109 Voorman v. Voight, 46 Cal. 392; Tucker v. Jones, 8 Mont. 232, 19 Pac. 571; Goldsmith v. Newhouse, 19 Colo. App. 1, 72 Pac. 809; Rudolph v. Smith, 18 Colo. App. 496, 72 Pac. 817.

110 Later v. Haywood, 14 Idaho, 45, 93 Pac. 374; Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 Pac. 1031.

111 Concanon v. Blake, 16 Wis. 518; Chicago Live Stock Co. v. Connally, 15 Okla. 45, 78 Pac. 318; Burt v. Utah Light etc. Co., 26 Utah, 157, 72 Pac. 497.

that incompetent declarations were admitted in evidence, without showing what those declarations were.[112] A statement in a bill of exceptions, that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.[113] A certificate of the official stenographer and an order of the court settling the bill of exceptions does not necessarily show that the bill of exceptions contains all the evidence.[114]

§ 1838. **Exceptions to findings.**—A defective finding of facts is not a ground for reversing a judgment, when that defect is not noticed or complained of in the court below.[115] A defective specification of grounds, explaining the points of objection, is not cured by the assignments in the exceptions taken to the findings.[116]

§ 1839. **Exceptions to instructions.**—It is the duty of appellant to incorporate instructions to which he objected in his bill of exceptions.[117] To enable the supreme court to pass upon the propriety of modified instructions, the instructions, as asked, should be before the court, and also the modifications, as made by the court below.[118] Under the Wyoming statute making the instructions part of the record, when in writing, numbered, signed by the judge, and so marked as to show which were given, refused, or modified, instructions not objected to may when so made part of the record be considered on appeal without being made part of the record.[119] Exceptions to instructions given or refused by the court should be specific.[120]

112 Hackett v. King, 8 Allen, 144, 85 Am. Dec. 695. That mere general exceptions will not be considered, see Kleinschmidt v. Iler, 6 Mont. 122, 9 Pac. 901; Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317.

113 Page v. O'Brien, 36 Cal. 559.

114 Carter v. Cummings, 34 Utah, 315, 97 Pac. 334.

115 McClusky v. Gerhauser, 2 Nev. 47, 90 Am. Dec. 512. As to exceptions to findings on statute of limitations, see Dougall v. Schulenberg, 101 Cal. 154, 35 Pac. 635.

116 Harper v. Minor, 27 Cal. 107.

117 Hicks v. Britt, 21 Ark. 422; Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Braverman v. Fresno etc. Irr. Co., 101 Cal. 644, 36 Pac. 386; Gilpin v. Gilpin, 12 Colo. 504, 21 Pac. 612; Spencer v. Spencer, 31 Mont. 631, 79 Pac. 320.

118 Boies v. Henney, 32 Ill. 130.

119 Stoner v. Mau, 11 Wyo. 366, 72 Pac. 193, 73 Pac. 548.

120 Baker v. McGinniss, 22 Ind. 257.

§ 1840. Exceptions to rulings.—Where an exception is taken to the decision of a court refusing a nonsuit, on settlement of the bill the plaintiff must see that all the evidence material for him is inserted in the bill of exceptions.[121] A trial before a referee should be conducted in the same manner as a trial before the court, and the evidence should be embodied in a bill of exceptions certified by the referee.[122] In a bill of exceptions, the words, "the foregoing was all the evidence given in the cause," are sufficient to exclude the presumption of other evidence.[123]

In the United States court of appeals the instruction excepted to must be set out in full.[124]

FORMS—BILL OF EXCEPTIONS.

§ 1841. Proposed bill of exceptions, jury trial.

Form No. 502.

[TITLE.]

Be it remembered, that this action was brought on for trial at the . . . term of said court, at the courthouse, in the city of . . . , on the . . . day of . . . , 19 . . , before the court, Hon. J. K., circuit judge, presiding, and a jury, L. M., Esq., appearing for plaintiff, and O. P., Esq., for defendant.

The case being called for trial, before entering upon examination of witnesses, the plaintiff moved for leave to amend his complaint, by inserting thereon the following averments: [Here insert amendment offered.]

The defendant, by counsel, opposed such motion on the grounds [state grounds of objections; as, for instance, that it substantially changed the cause of action].

Which said motion the court granted, and thereupon the defendant duly excepted.

[Defendant's Exception No. 1.]

The defendant then moved for a continuance on the ground that he had been taken by surprise by the said amendment, and

121 Ringgold v. Haven, 1 Cal. 108; Dickinson v. Van Horn, 9 Cal. 210, 211. As to exception to ruling of court upon a nonsuit, see Craig v. Hesperia etc. Water Co., 107 Cal. 675, 40 Pac. 1057; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146.

122 Goodrich v. City of Marysville, 5 Cal. 431; Phelps v. Peabody, 7 Cal. 52.

123 Ford v. Mitchell, 21 Ind. 54; Estep v. Larsh, 21 Ind. 183; Branham v. Bradford, 17 Ind. 47.

124 Dunlap v. Flowers, 21 Okla. 600, 96 Pac. 643; Rule 13 U. S. C. Ct.

filed the following affidavit in support of such motion [insert affidavit], which motion the court denied, and the defendant duly excepted.

[Defendant's Exception No. 2.]

The plaintiff then, to maintain the issue on his part, called as a witness E. F., who was duly sworn.

Thereupon the defendant objected to the reception of any evidence under the complaint, for the reason that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the court, and the defendant duly excepted.

[Defendant's Exception No. 3.]

The witness then testified as follows: [Here insert testimony in condensed narrative form until a question which was objected to is reached, when it should be inserted in full, with ruling and exception, as follows:]

Q. [Insert question.]

To which question the defendant objected as immaterial [state all grounds of objection fully as made], which objection was overruled, and the defendant excepted.

[Defendant's Exception No. 4.]

A. [Insert answer in full.]

Defendant then moved to strike out said answer for the reason that [state reason], which motion was overruled, and defendant excepted.

[Defendant's Exception No. 5.]

[Proceed in like manner with the direct examination of the witness.]

Upon cross-examination the witness testified: [Proceed as with the direct examination, also with the re-direct examination, if any, and with the plaintiff's other witnesses.]

The plaintiff then rested.

The defendant thereupon moved for judgment of nonsuit on the ground that the evidence failed to prove the plaintiff's cause of action, which motion was overruled by the court, and the defendant duly excepted [or, which motion was granted, and the plaintiff duly excepted.]

[Defendant's Exception No. 6, or Plaintiff's Exception No. 1.]

The defendant, to maintain the issue on his part, called as a witness G. F., and offered to prove by said witness [here state

what], to which plaintiff, by counsel, objected. The court sustained the objection, and the defendant duly excepted.

[Defendant's Exception No. 7.]

The said witness then testified as follows: [Here state testimony and rulings as in case of plaintiff's witnesses.]

The said witness upon cross-examination testified as follows: [Here state same.]

The defendant then rested.

The plaintiff, to further maintain the issue on his part, then called J. K., who, being sworn, testified: [Here insert testimony, with objections and exceptions.]

The testimony then closed. The foregoing is all the evidence given on both sides.

[Or, when the testimony is only in part given, the bill should state: The foregoing is all the testimony given on both sides, necessary to present the questions of law raised upon the trial.]

The defendant then, before argument to the jury, requested that the jury be directed to find a special verdict, and submitted the following proposed questions for such verdict: [Insert proposed questions.] Thereupon the court directed that the following questions be submitted to the jury for a special verdict: [Insert questions.] The defendant objected to the submission of the first question of said special verdict for the reason [state reason], which objection was overruled by the court, and the defendant excepted.

[Defendant's Exception No. 8.]

The plaintiff [or, defendant] then asked the court to instruct the jury as follows: [Here insert instructions asked, separately, and state at the end of each instruction refused: which instruction the court refused, and the plaintiff [or, defendant] duly excepted.]

The court then instructed the jury as follows: [Here insert charge, in separate propositions, inserting at the foot of each proposition to which exception is taken: to which instructions the defendant duly excepted.]

The jury then retired, and after deliberation returned into court with their verdict, which is of record, wherein they found for the plaintiff, and assessed his damages at the sum of . . . dollars [or, if the verdict is special, set it forth in detail.]

And afterwards, at the said term, defendant moved for a new trial on the judge's minutes, on the ground:

1. That the verdict is contrary to law;
2. That the verdict is contrary to the evidence;
3. [Set forth other grounds, if any.]

Which motion the court overruled, and thereupon the defendant duly excepted.

[Defendant's Exception No. —.]

And because the foregoing evidence, rulings, instructions, and exceptions do not appear of record, I, the undersigned, the . . . judge, who tried said action, have, on due notice, settled and signed this bill of exceptions, to the end that the same be made part of the record herein, this . . . day of . . . , 19 . . [And I certify that so much of said testimony as appears herein in the form of question and answer so appears by my direction in that form, because I deemed it material that it should so appear.]

[DATE.] O. P., . . . Judge of said Court.

§ 1842. Proposed amendments to bill of exceptions.

Form No. 503.

[TITLE.]

Sir: Please take notice that the following amendments are proposed on the part of the plaintiff to the bill of exceptions proposed by the defendant, to-wit:

First: On page . . . , line . . . , strike out the words [state words].

Second: On page . . . , line . . . , and at the end of sentence insert the following [state what].

Third: On page . . . , line . . . , strike out the words [state what], and insert in place thereof the words [state them].

[DATE.] G. H., Plaintiff's Attorney.

To J. K., Esq., Defendant's Attorney.

§ 1843. Notice of settlement on bill of exceptions on appeal.

Form No. 504.

[TITLE.]

To . . . , Attorney for Defendant:

Please take notice, that the proposed bill of exceptions of the plaintiff herein, and the defendant's amendments thereto, will be presented to the judge of this court for settlement on the . . . day of . . . , 19 . . , at . . . o'clock A. M., at his chambers in the courthouse, at . . . , in said county.

[SIGNATURE.]

CHAPTER LXVI.

TRANSCRIPT ON APPEAL.

§ 1844. The transcript.—It is the duty of the appellant to furnish the supreme court with a complete, clean, properly arranged, and properly authenticated transcript;[1] to attend to clerical and typographical errors, and see that the transcript is a true copy of the original in all respects other than maps and surveys.[2] Pleadings, proceedings, and statement shall be chronologically arranged, and each transcript shall be prefaced with an alphabetical index to its contents, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness, and the transcript shall have at least one blank fly-sheet cover.[3] It must be duly certified to be correct by the attorneys of the parties plaintiff and defendant, or by the clerk of the court from which the appeal is taken.[4] The object of this rule is to enable the attorneys to make up the record, and by omitting useless and superfluous matter save expense, facilitate the examination, and hasten the decision.[5] The transcript of records in civil cases must be printed,[6] and the folios numbered, and reference made to such folios upon each assignment of error.[7] Upon joint appeal, one transcript is sufficient.[8] The party filing the transcript, or the clerk of the court, may print the same, and the printed transcript, certified, shall be filed, and constitute the record of the cause in the appellate court.[9] A transcript should not be filed unless it complies with the rules of the appellate court.[10] And refusal to consider an appeal will

1 Kimball v. Semple, 31 Cal. 657. See, also, Kellogg v. Mayer, 54 Cal. 583; Martin v. Hudson, 79 Cal. 612, 21 Pac. 1135; Green v. McMann, 79 Cal. 561, 21 Pac. 964; Swasey v. Adair, 83 Cal. 136, 23 Pac. 284; Miskel v. Stone, 1 Wash. T. 229.

2 Franklin v. Goodman, 31 Cal. 458.

3 Cal. Sup. Ct. rule 8.

4 Cal. Sup. Ct. rule 2; Cal. Code Civ. Proc., § 953.

5 Estate of Boyd, 25 Cal. 511.

6 As to directions, see Cal. Sup. Ct. rule 7.

7 Bergmann v. Koernig, 43 Colo. 83, 95 Pac. 300; Cal. Sup. Ct. rules; Austin v. Austin, 42 Colo. 130, 94 Pac. 309.

8 Elliott v. Bogorth (Or.), 97 Pac. 632.

9 Cal. Sup. Ct. rule 12.

10 Fant v. Tandy, 7 Mont. 443, 17 Pac. 560.

be warranted where the transcript fails to comply therewith.[11] Mutilation of the transcript will not be tolerated.[12] And no hearing will be permitted on a transcript which has a useless index.[13] A rule requiring papers to be inserted in the transcript in chronological order must be complied with;[14] and where a court rule requires the appellant to number and index the pages, the clerk cannot receive and file a transcript not so prepared.[15]

The supreme court rules of South Dakota contemplate a carefully prepared abstract or abstracts, which shall take the place of the original record, for the purpose of the hearing and decision of the case, which will be heard and decided upon the facts so presented, and the original papers will not be examined in the supreme court, except to settle a disagreement between abstracts.[16] Exceptions, to be available to the appellant, must affirmatively appear in the abstract.[17] And if the abstract fails to show that an appeal has been taken, the supreme court will not assume jurisdiction, but will dismiss the appeal.[18] Under the Washington appeal act of 1893, the superior courts are not authorized to certify questions to the supreme court for decision.[19]

§ 1845. Filing transcript.—In California, where an appeal has been perfected the transcript shall be filed within forty days. And unless it is filed within forty days after the settlement of the bill of exceptions, the appellant is in default.[20] The time may be extended by order of the court upon stipulation of the parties or affidavit. If not filed within the time prescribed, the appeal may be dismissed on motion made during the first

11 Brownell v. McCormick, 7 Mont. 12, 14 Pac. 651.

12 Fant v. Tandy, 7 Mont. 443, 17 Pac. 560.

13 Mason v. McLean, 6 Wash. 31, 32 Pac. 1006.

14 Taylor v. McCormick, 8 Idaho, 37, 66 Pac. 805.

15 Emporia v. Kowalski, 65 Kan. 772, 70 Pac. 863.

16 Noyes v. Lane, 2 S. Dak. 55, 48 N. W. 322. So in Iowa: Bailey v. Mutual etc. Assoc., 71 Iowa, 690, 27 N. W. 770; Mielenz v. Quasdorf, 68 Iowa, 726, 28 N. W. 41.

17 Peterson v. Siglinger, 3 S. Dak. 255, 52 N. W. 1062.

18 First Nat. Bank v. Elevator Co., 2 S. Dak. 356, 50 N. W. 356; Valley City etc. Irr. Co. v. Schone, 2 N. Dak. 344, 50 N. W. 356. As to transcript under Colorado appeal act of 1895, see South Boulder etc. Reservoir Co. v. Community etc. Reservoir Co., 8 Colo. 429, 8 Pac. 919; Buddee v. Spangler, 12 Colo. 216, 20 Pac. 760; Kester v. Jewell, 15 Colo. 220, 25 Pac. 315. As to transcript under Washington appeal act of 1890, see Jones v. Jenkins, 3 Wash. 17, 27 Pac. 1022; Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449.

19 Munson v. Mudgett, 14 Wash. 662, 45 Pac. 306.

20 Bell v. Southern Pacific Co., 137 Cal. 77, 69 Pac. 692.

week of the term, upon notice.[21] Failure to file transcript in time is ground for dismissal of appeal, but such failure may be excused for cause shown.[22] The Montana statute prescribing the time in which the transcript on appeal shall be filed is directory, and not mandatory.[23] It is immaterial that an order of extension of time for filing transcript was not actually entered until the time extension had expired and the transcript was filed.[24] It is the duty of appellant to see that filing is done in time.[25] It has been held by the United States supreme court that the general rule that transcript of record must be filed and the case docketed at the term next succeeding the appeal, has, however, exceptions; as where appellant is prevented from seasonably obtaining the transcript, by fraud of the other party, or by the ill-founded order of the court below.[26] Under the statute of Iowa, it is the duty of the appellant to file a perfect transcript.[27]

Where a deposit of the filing fee with the clerk is prerequisite to the filing of the transcript, and it is not made within the time prescribed, the transcript cannot be considered.[28]

§ 1846. Service of transcript.—As soon as practicable after being printed, and at or before the time of filing the same, a

21 Cal. Sup. Ct. rules 2, 5; Consult Somers v. Somers, 83 Cal. 621, 24 Pac. 162; Bethell v. Rogers, 100 Cal. 175, 34 Pac. 645; Bush v. Geisey, 16 Or. 267, 19 Pac. 122; McCarty v. Wintler, 17 Or. 391, 21 Pac. 195; Judkins v. Taffe, 21 Or. 89, 27 Pac. 221; Chemin v. City of East Portland, 19 Or. 512, 24 Pac. 1038; Cook v. Albina, 20 Or. 190, 25 Pac. 386; Sebree v. Smith, 2 Idaho, 357, 16 Pac. 477; Fahey v. Belcher, 3 Idaho, 355, 29 Pac. 112; Mahony v. Marshall, 3 Idaho, 343, 29 Pac. 110.

22 Westheimer v. Thompson, 3 Idaho, 418, 31 Pac. 797; Crawford v. Haller, 2 Wash. T. 161, 2 Pac. 353; Miller v. Savings Bank, 5 Wash. 200, 31 Pac. 712; Smith v. Arthur, 5 Wash. 356, 31 Pac. 757; Bast v. Hysom, 5 Wash. 88, 31 Pac. 319; State v. Wilson, 7 Wash. 502, 35 Pac. 377; Judge v. Ohm, 89 Cal. 134, 26 Pac. 649; Chapman v. Bank of California, 88 Cal. 419, 26 Pac. 608; Emeric v. Alvarado, 106 Cal. 646, 40 Pac. 11. As to extension of time to file transcript, see Desmond v. Faus, 83 Cal. 134, 23 Pac. 303; Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228; Bush v. Geisey, 16 Or. 267, 19 Pac. 122; Kelley v. Pike, 17 Or. 330, 20 Pac. 685. As to stipulation extending such time, see Wittram v. Crommelin, 72 Cal. 89, 13 Pac. 160; Poupion v. Muzio, 68 Cal. 235, 9 Pac. 97; Wood v. Forbes, 62 Cal. 37.

23 Territory v. Hanna, 5 Mont. 247, 5 Pac. 250; Territory v. Mackey, 8 Mont. 172, 19 Pac. 395.

24 Quartz Gold Min. Co. v. Patterson (Or.), 96 Pac. 551.

25 Wettermark v. Roark, 20 Okla. 606, 95 Pac. 228.

26 United States v. Gomez, 3 Wall. 752, 18 L. Ed. 212. See, also, Thompson v. Blanchard, 2 N. Y. 561.

27 Hall v. Smith, 15 Iowa, 584.

28 Hilts v. Hilts, 43 Or. 162, 72 Pac. 697.

printed copy shall be served on the attorney of the adverse party, and if there be more than one adverse party, on the attorney of each party appearing by attorney.[29] A failure of such service is not a ground for dismissing the appeal if reasonable diligence is used; but respondent may object to a hearing at the first term if service is not made in time for him to prepare for argument. Service should be made before or at the time of filing, and if the transcript is printed by the clerk, the appellant should direct the clerk to forward him copies as soon as printed for service.[30] In Washington, proof of service of the notice of appeal must be indorsed on the transcript at the time of its filing.[31] Besides the original, there shall be filed twenty copies of the transcript, and points and authorities, and statement of facts, which copies shall be distributed by the clerk as prescribed by law.[32] Where a plaintiff in error was allowed "until June 20th to make and serve a case on writ of error," and it was served on June 20th, it was held that the time granted had expired.[33]

§ 1847. What the transcript must contain.—On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court,[34] or any bill of exceptions settled,[35] or used on motion for a new trial, may be used on appeal from a final judgment equally as on appeal from the order granting or refusing a new trial.[36] The presence of a copy of the judgment-roll in the record is jurisdictional, and without it the court cannot consider any question on the appeal.[37] On

29 Cal. Sup. Ct. rule 11.

30 Estate of Boyd, 25 Cal. 512.

31 Rodman v. Manning, 50 Or. 506, 93 Pac. 366.

32 Cal. Sup. Ct. rule 2, subd. 6. See rules of the supreme court of California, adopted in 1904; Lang v. Specht, 62 Cal. 145.

33 Croco v. Hille, 66 Kan. 512, 27 Pac. 208.

34 As provided in Cal. Code Civ. Proc., § 661; Powell v. May, 29 Mont. 71, 74 Pac. 80; O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 692; Village of Sand Point v. Doyle, 9 Idaho, 236, 74 Pac. 861.

35 As provided in Cal. Code Civ. Proc., §§ 649, 650.

36 Cal. Code Civ. Proc., § 950.

37 Featherman v. Granite County, 28 Mont. 462, 72 Pac. 972; Beck v. Holland, 28 Mont. 460, 72 Pac. 972.

appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment, or order appealed from, and of papers used on the hearing in the court below.[38] If the transcript does not contain the judgment from which the appeal purports to be taken, the appeal cannot be entertained.[39] The statement in the bill of exceptions that a judgment was rendered cannot supply the place of the judgment itself.[40] On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 661 of the code.[41] These copies must be arranged in their chronological order, and to them must be added, in cases in which it is necessary, an assignment of errors, and a stipulation of the attorneys, or the certificate of the clerk, that the transcript is correct, and that the necessary bond on appeal has been given, or that the same has been waived by stipulation. Evidence offered and refused to be considered must be entered as part of the bill of exceptions.[42] All the evidence must be incorporated, or the sufficiency of the evidence cannot be passed upon.[43]

§ 1848. Affidavits and documents.—Affidavits or documents copied into the transcript, but not certified by the clerk or judge, or not presented by statement or bill of exceptions, cannot be considered.[44] A mere marking of the affidavits by the clerk of the court, as having been read on the hearing, is not a sufficient record on appeal.[45] So of affidavits used on motion to open the judgment;[46] nor the affidavit of one of the attorneys, showing the objections made to the selection of the jury.[47] The record, and not *ex parte* affidavits, determines the question of jurisdiction

38 Cal. Code Civ. Proc., § 951.

39 Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624; People v. Sing Lum, 60 Cal. 6.

40 Board of Commissioners Yuma County v. Lovell, 20 Colo. 80, 36 Pac. 878.

41 Cal. Code Civ. Proc., § 952.

42 Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 Pac. 1031.

43 Carter v. Cummings, 34 Utah, 315, 97 Pac. 334; Cunningham v. Lakin, 50 Wash. 394, 97 Pac. 447.

44 Gordon v. Clark, 22 Cal. 534, 83 Am. Dec. 82; Stone v. Stone, 17 Cal. 513; People v. Honshell, 10 Cal. 83.

45 Von Glahn v. Brennan, 81 Cal. 261, 22 Pac. 596. See White v. White, 88 Cal. 429, 26 Pac. 236.

46 Ritter v. Mason, 11 Cal. 214.

47 Magee v. Mokelumne Hill Canal etc. Co., 5 Cal. 258.

on appeal.[48] The certificate of the judge, of the matters read or referred to, where documents and depositions were used on a motion for new trial, will be sufficient identification of the documents and depositions used,[49] although not literally "attached,"[50] and a copy of such papers used on the hearing of the motion must be furnished.[51] So on a review of an order, on motion to dismiss a complaint on specified grounds.[52] Affidavits filed in opposition to an application for an injunction are part of the record, and may be considered, though not embraced in the statement.[53] But facts which ought to appear in a statement of facts properly settled, signed, and authenticated, cannot, when controverted, be established in the supreme court by affidavits or other proof.[54]

§ 1849. Copy of map.—The appellate court does not examine the original transcript in the clerk's office, unless it contains the only copy of a map or survey.[55] But one copy of any map or survey need be furnished.[56]

§ 1850. Findings.—Where a cause is tried by a judge alone, the record should disclose a finding by him of the facts, and a statement of his conclusions of law upon the facts.[57] The decision of the court must be given in writing and filed with the clerk, and the facts found and conclusions of law must be separately stated. Findings of fact, however, may be waived by the parties.[58]

§ 1851. Judgment-roll.—Where a statute expressly requires that on appeal from a final judgment the appellant must furnish the court with a copy of the judgment-roll, the absence of the judgment-roll in the record is jurisdictional.[59] If the transcript

48 Gilbert County v. Husted, 50 Wash. 61, 96 Pac. 835.

49 Loucks v. Edmondson, 18 Cal. 203; Walden v. Murdock, 23 Cal. 549, 83 Am. Dec. 135.

50 O'Neill v. Ternes, 32 Wash. 528, 73 Pac. 692.

51 Loucks v. Edmondson, 18 Cal. 203; Walden v. Murdock, 23 Cal. 549, 83 Am. Dec. 135; Bodley v. Ferguson, 25 Cal. 584.

52 Freeborn v. Glazer, 10 Cal. 337.

53 Gagliardo v. Crippin, 22 Cal. 362.

54 State v. Hinchey, 5 Wash. 326, 31 Pac. 870. See Clanton v. Coward, 67 Cal. 373, 7 Pac. 787.

55 Franklin v. Goodman, 31 Cal. 458.

56 Cal. Sup. Ct. rule 9.

57 Hoagland v. Clary, 2 Cal. 474.

58 See Cal. Code Civ. Proc., §§ 632-634.

59 Featherman v. Granite County, 28 Mont. 462, 72 Pac. 972.

does not contain all the judgment-roll, but contains all that is necessary, the defect is waived by stipulation that it contains all that is necessary for the purpose of the appeal.[60] An appeal will not be dismissed by reason of a defective judgment-roll, when all the portions of the roll are before the appellate court which are requisite to a full determination of the cause.[61] If it be contended that the judgment-roll is defective or lacking in material parts, the omitted documents, if properly certified, may be brought before the appellate court, and it will determine what constitutes the judgment-roll.[62] An order substituting a party is part of the judgment-roll.[63] The appearance of an attorney is not a part thereof;[64] nor is a stipulation;[65] neither is a bill of particulars, nor instructions of the court;[66] nor a notice of motion for judgment on the pleadings;[67] nor affidavits used on motion to discharge attachment;[68] nor proceedings relating to appointment of guardian *ad litem*;[69] nor the minutes of the court.[70] The recital of an exception in the record proper, immediately following the ruling of the court on a motion, is not equivalent to a preservation of the exception by a bill of exceptions. But a motion to strike out part of a pleading is held to be part of the judgment-roll,[71] as is also a bill of exceptions which has been duly settled.[72] It is only the finding of a referee upon the whole issue that must stand as the finding of the court, and form part of the judgment-roll.[73] But the transcript should always contain enough of the record of the court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing by

60 Solomon v. Reese, 34 Cal. 28.

61 Paige v. Roeding, 89 Cal. 69, 26 Pac. 787.

62 Paige v. Roeding, 96 Cal. 389, 31 Pac. 264.

63 Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

64 Lyons v. Roach, 84 Cal. 27, 23 Pac. 1026.

65 San Francisco Sav. Union v. Myers, 76 Cal. 624, 18 Pac. 686; Spreckels v. Ord, 72 Cal. 86, 13 Pac. 158.

66 Paris v. Raynor, 76 Cal. 647, 18 Pac. 788.

67 Prescott v. Grady, 91 Cal. 518, 27 Pac. 755.

68 Bowring v. Bowring, 4 Utah, 185, 7 Pac. 716; Windt v. Baurriza, 7 Wash. 867.

69 Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754.

70 Perkins v. Loux, 14 Idaho, 607, 95 Pac. 694.

71 Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Am. St. Rep. 461, 28 Pac. 291, 14 L. R. A. 588.

72 Cal. Code Civ. Proc., § 950; Lunnun v. Morris, 7 Cal. App. 710, 95 Pac. 907.

73 Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021.

the court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue should be furnished in the transcript.[74] The record on appeal must show a foundation in fact for the points made. It is not sufficient that an objection by counsel at the trial recites certain facts.[75] The fact that a record is erroneous in stating that the parties waived a jury cannot be shown by an affidavit of the judge who tried the cause.[76]

§ 1852. Motions.—A motion is no part of a record, and its indorsement by the judge as "correct" does not make it so.[77] It must be made to appear that the transcript contains all papers, records, and documents used on the hearing of the motion.[78]

§ 1853. New trial.—On appeal from an order denying a new trial, the appellant is only required to furnish copies of the notice of appeal, of the order appealed from, and of the papers used on the hearing of the motion.[79] A notice of a motion for a new trial forms no part of the record on appeal,[80] unless incorporated in the statement or bill of exceptions.[81] Subsequent decisions seem, however, to require more. Evidence of service of the notice of motion must be contained in the record, or it must clearly appear that service was waived.[82] The transcript must also contain an authenticated copy of the pleadings, or an agreed statement of their contents;[83] or such pleadings, depositions, and minutes as were read or referred to on the hearing, identified by the certificate of the judge, and the affidavits and statement upon which the motion was made.[84] Where the record does not disclose that the statement used upon motion for new

74 McQuade v. Whaley, 29 Cal. 614.

75 Williamson v. Tobey, 86 Cal. 497, 25 Pac. 65; Davis v. Baker, 88 Cal. 106, 25 Pac. 1108.

76 Smith v. Brannan, 13 Cal. 115.

77 Thompson v. Buckestos, 1 Or. 17.

78 Doust v. Rocky Mountain Bell Tel. Co., 14 Idaho, 677, 95 Pac. 209.

79 Wakeman v. Coleman, 28 Cal. 58; Ingerman v. Moore, 90 Cal. 410, 25 Am. St. Rep. 138, 27 Pac. 306.

80 Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Afferbach v. McGovern, 79 Cal. 268, 21 Pac. 837.

81 Alpers v. Schammel, 75 Cal. 590, 17 Pac. 708; Perkins v. McDowell, 3 Wyo. 328, 23 Pac. 71.

82 Calderwood v. Brooks, 88 Cal. 151; Gum v. Murray, 6 Mont. 10, 9 Pac. 447.

83 McQuade v. Whaley, 29 Cal. 612.

84 Wetherbee v. Carroll, 33 Cal. 549; Davis v. Ogden (Wyo.), 97 Pac. 1074.

trial was ever settled, it cannot be considered on appeal.[85] There is no necessity of preparing a statement on appeal from an order granting or refusing a new trial, the statement on motion for new trial being sufficient.[86] It is not necessary in all cases to bring up the pleadings in full. A summary will, in most cases, answer every purpose on appeal, if it be agreed to by the attorneys of the parties.[87] When the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself on the record.[88] If a new trial has been denied, on the ground that the evidence is insufficient to sustain the cause of action, an authenticated copy or an agreed statement of the pleadings must be included in the transcript.[89] An appellate court will not consider an order on motion for a new trial, when the motion, judgment, and pleadings are only presented to it by a bill of exceptions.[90] In absence of a written order denying a motion for a new trial, a copy of the minute entry thereof must be embodied in the statement.[91] An appeal was taken from a judgment of nonsuit, and an order denying a motion for a new trial. The transcript on appeal consisted of the statement on motion for a new trial, and a stipulation that said motion was denied, that the appeal was duly taken and perfected, and "that the foregoing transcript is correct." It was held that in the absence of the pleadings, or a statement of the issues, the appellate court cannot ascertain whether the court below erred in granting the nonsuit, and the judgment will be affirmed.[92]

§ 1854. Notice of appeal.—The transcript must show that notice of appeal has been duly served upon the other side.[93] A waiver of the filing by stipulation of the parties is not equivalent to the filing of the notice; for consent, though it may waive error, cannot confer jurisdiction.[94]

85 Springville v. Fullmer, 7 Utah, 454, 27 Pac. 577.

86 Loucks v. Edmondson, 18 Cal. 203.

87 Todd v. Winants, 36 Cal. 129.

88 Harper v. Minor, 27 Cal. 108.

89 McQuade v. Whaley, 29 Cal. 612; Wetherbee v. Carroll, 33 Cal. 549; Craig v. Fry, 68 Cal. 363, 9 Pac. 550.

90 New Orleans R. R. Co. v. Allbritton, 38 Miss. 242, 75 Am. Dec. 98.

91 Kirman v. Johnson (Nev.), 96 Pac. 1057.

92 Todd v. Winants, 36 Cal. 129.

93 Franklin v. Reiner, 8 Cal. 340; Western Pacific R. R. Co. v. Reed, 35 Cal. 621; Tootle v. French, 3 Idaho, 1, 25 Pac. 1091; Carr v. State, 1 Kan. 331.

94 Bonds v. Hickman, 29 Cal. 463; Low v. Rice, 8 Johns. 409; Carr v. State, 1 Kan. 331.

§ 1855. Order after judgment.—On an appeal from an order after judgment, the transcript should contain a copy of the order appealed from, and copies of all papers used on the hearing.[95] And if based on affidavits and other evidence, it must contain a statement made and settled in the mode prescribed for the making and settling of statements on appeals from final judgments.[96] An appeal from an order denying a motion to set aside a judgment of dismissal does not bring up an order denying a prior application therefor for review, since such order is not a previous order in the same proceeding leading up to the order appealed from.[97]

§ 1856. Order based on evidence.—When an appeal is from an order based on evidence other than affidavits, the record consists of the order appealed from and a statement prepared and settled, containing so much of said evidence as is necessary to present the points relied on.[98] The appellate court cannot reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before it.[99]

§ 1857. Pleadings.—On an appeal from a final judgment, the transcript must contain a copy of the pleadings.[100] Attorneys may agree as to the contents of the pleadings, and introduce into the transcript such agreement, instead of printing the entire pleadings. This course should be pursued in all cases where no point is made on them.[101] But if an amended complaint or answer is filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript.[102] A statement of the contents of pleadings not agreed to by the opposite attorney or included in the settled statement, though placed in the transcript, constitutes no part of the record.[103] Where, on appeal in an action to restrain the opening of a highway alleged to have

95 Cal. Code Civ. Proc., § 951; Glidden v. Packard, 28 Cal. 649. See Miller v. Lux, 100 Cal. 609, 35 Pac. 435, 639.

96 Wetherbee v. Carroll, 33 Cal. 549. As to identification of affidavits used on hearing, see Pardy v. Montgomery, 77 Cal. 326, 19 Pac. 530.

97 Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297, 66 Pac. 384; State v. Superior Court, 30 Wash. 43, 70 Pac. 102.

98 Wetherbee v. Carroll, 33 Cal. 549.

99 State v. Bonds, 2 Nev. 265.

100 Cal. Code Civ. Proc., § 950; Hart v. Plum, 14 Cal. 148.

101 McQuade v. Whaley, 29 Cal. 612.

102 Marriner v. Smith, 27 Cal. 649.

103 McQuade v. Whaley, 29 Cal. 612.

been vacated, an instrument purporting to be a copy of the vacation petition was included in the transcript, the court will assume that such petition was made a part of the complaint, though it was not referred to therein as an exhibit.[104] It must be presumed on appeal that the answer filed by defendant was properly on file, and judgment for plaintiff could not therefore be entered by default.[105]

§ 1858. Amendment of transcript.—If the judgment copied in the transcript does not correctly describe the land as shown by the judgment rendered and entered, and the latter being correct, the judgment in the transcript should be amended.[106] Appellant may move to supply an omission which was made upon suggestion, according to court rule 14.[107] The supreme court has discretionary power to allow filing of a supplemental abstract.[108] A motion to strike out parts of the transcript is made too late, after the term of its filing.[109]

§ 1859. Separate appeals.—When defendants take separate appeals, and sign distinct bonds, one transcript will suffice.[110] Where one of the parties in an action appeals, and another party in the same action takes another and independent appeal, neither party, in the appellate court, can refer to the transcript in the other appeal for the facts, without a stipulation to that effect. Each appeal must be heard on its own record.[111]

§ 1860. Statement.—Where the transcript does not contain any statement or grounds of appeal, and no assignments of errors or brief are filed, the appeal will be dismissed.[112] No portion of a statement can be omitted except on stipulation of the other party.[113] Where a copy of an order certified by the clerk, sustaining a demurrer to a replication, together with the judgment-roll, was filed, but there was no statement or bill of exceptions,

104 Wagner v. Malut, 32 Wash. 542, 73 Pac. 675.

105 Gilbert v. Kelly, 138 Cal. 689, 72 Pac. 344.

106 Worcester v. Kitts, 8 Cal. App. 181, 96 Pac. 335.

107 Flannigan v. Towle, 8 Cal. App. 229, 96 Pac. 507.

108 Denver Ry. Tramway Co. v. Roberts, 43 Colo. 522, 96 Pac. 186.

109 Perkins v. Loux, 14 Idaho, 607, 95 Pac. 694.

110 Baham v. Langfield, 16 La. Ann. 156.

111 Gates v. Walkser, 35 Cal. 289.

112 Fowler v. Harbin, 23 Cal. 631; Hoadley v. Crow, 22 Cal. 265.

113 Kimball v. Semple, 31 Cal. 657.

the action of the court below on the demurrer could not be reviewed.[114] This case was overruled in a later decision,[115] where it is said that when a demurrer is sustained and the pleading demurred to is amended, the amendment operates as an acquiescence in the decision on the demurrer; but that a refusal to amend cannot be deemed an acquiescence in the decision; and neither a bill of exceptions nor statement is required where the record already presents the question of law and the decision of the court.

An appeal must be prosecuted and determined on the record.[116] Without a transcript on file, the appellate court is without jurisdiction.[117] When a party fails to file the transcript within the time limited by law, the right of appeal is lost until an order is obtained extending the time for filing. A second appeal cannot be taken.[118] If the transcript is on file when notice of motion is given to dismiss the appeal, it defeats the motion; if filed after the notice is given, the motion is not defeated, but circumstances to excuse the default may be shown by affidavit.[119]

§ 1861. What transcript should not contain.—Nothing is included in the record of a suit but the judgment-roll.[120] Such parts of the judgment-roll as are of no use for the purposes of the appeal should be omitted,[121] or such matters as do not tend in some degree to illustrate the points made on appeal.[122] The summons and return should be printed in the transcript only when error is assigned in regard to them.[123] A judgment in another case, which is not made part of the complaint or answer by averment, and was not one of the papers on the hearing of

114 Bostwick v. McCorkle, 22 Cal. 669.

115 Smith v. Lawrence, 38 Cal. 28, 99 Am. Dec. 344.

116 Luthe v. Luthe, 12 Colo. 429, 21 Pac. 467.

117 Swope v. Smith, 1 Okla. 283, 33 Pac. 504. See, as to result of deficient transcript, Hunt v. Ohmertez, 15 Colo. 447, 24 Pac. 1047; Barger v. Halford, 10 Mont. 57, 24 Pac. 699; Starr v. Gregory etc. Min. Co., 6 Mont. 485, 13 Pac. 195; Riborado v. Quang Pang Min. Co., 2 Idaho, 144, 6 Pac. 125; Murphy v. Fuld, 2 Idaho, 167, 9 Pac. 607; Purdum v. Taylor, 2 Idaho, 167, 9 Pac. 607.

118 Nestucca Road Co. v. Landingham, 24 Or. 439, 33 Pac. 983.

119 Carter v. Paige, 77 Cal. 64, 19 Pac. 2. As to papers on appeal in causes of equitable cognizance, see McKinnon v. Kingston Land etc. Co., 4 Wash. 535, 30 Pac. 642; State v. Allyn, 2 Wash. 470, 27 Pac. 233; Metzler v. James, 9 Colo. 115, 10 Pac. 654.

120 Sharp v. Daugney, 33 Cal. 505.

121 Solomon v. Reese, 34 Cal. 28.

122 Estate of Boyd, 25 Cal. 511.

123 Taylor v. McCormick, 8 Idaho, 37, 66 Pac. 805.

motion to grant or dissolve an injunction, though printed in the transcript, is no part of the record.[124] When an appeal is taken on the judgment-roll alone, and no statements made, a specification of grounds of error is not required to be inserted in the transcript. But when the court comes to examine the case, and no brief or statement of points and authorities is furnished on the part of the appellant to aid in the investigation, as required by the rules of the supreme court, the judgment will be affirmed without any examination of the case.[125] A party cannot incorporate in his transcript *ex parte* affidavits impeaching the statement, and after the final submission of the case bring the question before the supreme court for the first time in his brief.[126] Extraneous matter should be omitted, such as the opinion of the trial court, rendered in deciding the case,[127] or statements of counsel unsupported by the record.[128]

§ 1862. **Stipulations.**—A stipulation signed by the attorneys of the parties, that "the foregoing transcript is correct," does no more than take the place of the clerk's certificate that the papers to which it is annexed are true copies.[129] It does not preclude respondents from denying the correctness or sufficiency of the bill of exceptions.[130] Where there is in the transcript a stipulation by the parties that "the plaintiff duly excepted" to the "charges and each part thereof," it will be construed as a stipulation that the exceptions were sufficiently specified to render them available.[131]

The transcript in each case should contain in it all the matter which is to be determined, and counsel should not attempt to impose their work upon the appellate court, by stipulating that all pertinent evidence contained in the transcript in another cause should be considered as if embodied in the new trial statement in the case in which the stipulation is made.[132]

124 Sanchez v. Carriaga, 31 Cal. 170.

125 Hutton v. Reed, 25 Cal. 487. See Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Bedan v. Turney, 99 Cal. 649, 34 Pac. 442.

126 Wormouth v. Gardner, 35 Cal. 227.

127 Lomita Land etc. Co. v. Robinson, 154 Cal. 36, 97 Pac. 10.

128 Millsap v. Balfour, 154 Cal. 303, 97 Pac. 668.

129 Todd v. Winants, 36 Cal. 129.

130 Wetherbee v. Carroll, 33 Cal. 549.

131 Bowman v. Cudworth, 31 Cal. 148.

132 Spangler v. San Francisco, 84 Cal. 12, 18 Am. St. Rep. 158, 23 Pac. 1091.

§ 1863. Undertaking.—The appellant must show that the required undertaking on appeal has been given, either by inserting a copy of the undertaking in the transcript, or by stating in the stipulation of the attorneys or in the certificate of the clerk that the undertaking has been filed, and the time of filing the same.[133] The undertaking on appeal is not one of the papers required to be set out in the transcript by sections 950, 951, and 952 of the California Code of Civil Procedure, and should not be embodied therein.[134]

§ 1864. Alternative method of preparing the record.—In lieu of the bill of exceptions, as provided for in section 650 of the California Code of Civil Procedure, appellant may file with the clerk of the trial court a notice of his desire or intention to appeal, or that he has appealed, within ten days after notice of entry of the judgment, order, or decree, and therein request that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts, or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Thereupon the court requires the reporter to write the same up, within twenty days.[135] Upon filing the notice, a bond must be filed in an amount fixed by the clerk, to secure payment for costs of the transcript.[136] Upon filing the transcript, the clerk gives the attorneys five days' notice of the presentation of the transcript to the trial judge for approval. The judge then certifies to the truth and correctness of the transcript, and it becomes a part of the judgment-roll, which may be considered on appeal, in lieu of the bill of exceptions now provided for by law. Any matters of record may be omitted by stipulation.[137] The clerk, within ten days, transmits the judgment-roll thus prepared to the clerk of the upper court, where it is filed in place of the printed transcript required by the old method.[138] The briefs of the appellant and the respondent must be printed and must contain portions of the said judgment-roll as referred to in the briefs.

133 Bryan v. Berry, 8 Cal. 130; Wakeman v. Coleman, 28 Cal. 58.

134 San Francisco etc. R. R. Co. v. Anderson, 77 Cal. 297, 19 Pac. 517.

135 Cal. Code Civ. Proc., § 953a.

136 Cal. Code Civ. Proc. § 953b.

137 Cal. Code Civ. Proc., § 953a.

138 Cal. Code Civ. Proc., § 953c.

§ 1865. Form of stipuation.

Form No. 505.

It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected, and the requisite undertaking on appeal was given and filed within the time prescribed by law [or, that an undertaking on appeal is hereby expressly waived by the respondent]; that the foregoing is a full, true, and correct transcript, and that the appeal herein may be heard thereon.

A. B., Attorney for Appellant.
C. D., Attorney for Respondent.

§ 1866. Reporter's certificate.

Form No. 506.

[TITLE.]

I, L. M., phonographic reporter of the . . . court, state of . . ., duly appointed and qualified, do hereby certify that the foregoing is a correct transcript, in longhand, of my notes taken upon the trial of said action, and that the same contains a full and complete transcript of the evidence and all other matters relating to said action contained in said notes.

[DATE.] L. M., Official Reporter.

§ 1867. Certificate to judgment-roll.

Form No. 507.

[TITLE.]

I, the undersigned, county clerk of the said county of . . ., state of California, and *ex-officio* clerk of the superior court of the said state, in and for said . . . county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in judgment-book . . . of said court, at page . . . And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and the seal of said superior court, this . . . day of . . ., 19 . .

. . ., Clerk.
By . . ., Deputy Clerk.

CHAPTER LXVII.

HEARING AND BRIEFS.

§ 1868. Hearing on appeal.—After the record is fully made up and printed, and certified to by the county clerk of the proper county, or by the attorneys, it is called the transcript; and upon a deposit of fifteen dollars with the clerk of the supreme court, it is filed, and the case goes regularly on the calendar of that court, and is called in its order at the next term thereafter. Generally the causes in the supreme court are submitted on briefs; and it is deemed the better practice to do so unless the case involve some new or important principle, and even then an oral argument, however able or convincing, is necessarily forgotten before the case is taken up to be decided by the court, as months often elapse before it can be reached in its order. To understand the practice in the supreme court of California, as well as of the highest courts in any of the other states, a full knowledge of the rules of such courts must be acquired. Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation whenever the purposes of justice require it.[1] But courts, as well as members of the bar, should respect the same, and regulate their conduct in conformity therewith.[2] This is especially important in the practice in the United States district, circuit, and supreme courts.

Where no briefs are filed within the time specified, when the cause is submitted on briefs to be filed, and the transcript contains no assignment of error, judgment will be affirmed.[3]

In general, it is inexpedient and contrary to good practice to attempt to review a cause, except so far as counsel give assistance

1 Pickett v. Wallace, 54 Cal. 148; Sullivan v. Wallace, 73 Cal. 307, 14 Pac. 789; People v. Demasters, 105 Cal. 669, 39 Pac. 35. That rules of procedure should be liberally construed, see Smith v. Whittier, 95 Cal. 279, 30 Pac. 529. See, also, Warner v. F. Thomas etc. Cleaning Works, 105 Cal. 409, 38 Pac. 960.

2 Martin v. De Loge, 15 Mont. 343, 39 Pac. 312. See Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878.

3 Hutton v. Reed, 25 Cal. 488; Holm v. Roach, 25 Cal. 37; Edmondson v. Alameda County, 24 Cal. 349; Hickinbotham v. Monroe, 28 Cal. 489; Drexler v. Seal Rock Tobacco Co., 78 Cal. 624, 21 Pac. 372; Faris v. Lampson, 73 Cal. 190, 14 Pac. 674.

by brief and argument.[4] If the appellant insists in his brief that the respondent must recover the whole amount sued for or nothing, the court will not decide whether the judgment was entered for a proper sum.[5] While the uncontradicted statements of counsel in his brief cannot be taken as part of the record, still they may be referred to as tending to show that the inference drawn from a record is not unfounded.[6] Points upon which appellant relies should be made in his opening brief.[7] The court will consider no others.[8] Assignments of error which do not refer to the folio number of the transcript where the rulings appear are not sufficient.[9] The points of counsel should be consistent with each other. Counsel cannot claim there was a bill of sale to the opposite party for the purpose of excluding evidence of a verbal sale, and then insist that the bill of sale was void.[10]

Where counsel prints in his brief a document which is not part of the record on appeal, the court may, as against him, treat the document as properly before it.[11] It is a reprehensible breach of duty for counsel to insert in their briefs any reflections upon the judge of the court below, and should not be tolerated.[12] But the motion to strike out a brief on this ground should point out the objectionable language.[13] It is not the duty of the appellate court to search the record for errors not specifically pointed out

4 Townsend v. Fulton Irr. Ditch Co., 17 Colo. 142, 29 Pac. 453. As to the time of filing briefs and the practice thereon, consult Cal. Sup. Ct. rule 2; Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878; Peek v. Peek, 75 Cal. 298, 17 Pac. 213; Campodonico v. Oregon Imp. Co., 85 Cal. 218, 24 Pac. 746; Cronkhite v. Bothwell, 3 Wyo. 739, 31 Pac. 400; Skagit Ry. etc. Lumber Co. v. Cole, 1 Wash. 330, 26 Pac. 535; In re Hill's Heirs, 7 Wash. 421, 35 Pac. 131; Gregory v. Diggs, 108 Cal. 123, 41 Pac. 34; Merchants' Nat. Bank v. McKinney, 1 S. Dak. 78, 45 N. W. 203.

5 Moore v. Murdock, 26 Cal. 514.

6 Hood v. Hamilton, 33 Cal. 698.

7 Hihn v. Courtis, 31 Cal. 398; Kelly v. McCormick, 28 N. Y. 318.

8 Lehane v. Butte El. Ry. Co., 37 Mont. 564, 97 Pac. 1038; Murphy v. Stelling, 8 Cal. App. 702, 97 Pac. 672; Carstenbrook v. Wedderien, 7 Cal. App. 465, 94 Pac. 372; Keel v. New York Life Ins. Co. 20 Okla. 195, 94 Pac. 177.

9 Bergmann v. Koernig, 43 Colo. 83, 95 Pac. 300; Austin v. Austin, 42 Colo. 130, 94 Pac. 309.

10 Patterson v. Keystone Min. Co., 30 Cal. 360.

11 Estate of Cahill, 74 Cal. 52, 15 Pac. 364.

12 Sharp v. Hoffman, 79 Cal. 404, 21 Pac. 846; Brownell v. McCormick, 7 Mont. 12, 14 Pac. 651.

13 Littlejohn v. Miller, 5 Wash. 399, 31 Pac. 758. See, also, as to striking brief from records, State v. Oleson, 9 Wash. 186, 37 Pac. 419; Sheehan v. Levy, 1 Wash. 149, 23 Pac. 802. As to expense of brief, see Bellingham etc. Land Co. v. Dibble, 6 Wash. 165, 32 Pac. 1081. As to amendment of brief, see State v. Carter, 8 Wash. 272, 36 Pac. 29.

or discussed in the appellant's brief.[14] And where the brief of counsel for the appellant is substantially a mere recapitulation of the general assignments of error as they appear in the bill of exceptions, giving no reasons why the court erred, and citing no authorities, and, upon a cursory view of the record, no material error is noticed, the judgment will be affirmed.[15]

§ 1869. Errors in the record, how amended.—Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a resettlement; and upon proper showing, made before argument, the supreme court may send the record back to the court below for that purpose.[16] So, where the errors are admitted.[17] Where a motion is made to dismiss the appeal on the ground that the appeal was not filed within five days after the service of the notice of appeal, as required by statute, and appellant has no notice of the motion until after the transcript is filed in the supreme court, he is entitled to have the record returned to the lower court in order to submit evidence to show that the statement in the record as to the date of service of the notice of appeal is erroneous.[18] Irrelevant portions of the case may be stricken out, or matter improperly inserted.[19] Where there is no properly certified copy of the notice of appeal in the record of appeal, the appellant, on motion, may be authorized to complete the record by supplying the defect.[20] But the supreme court cannot amend a complaint so as to make it correspond with the verdict.[21] Cases appealed to the supreme court must be heard and decided on the record made in the trial court.[22] Motion for amendment after return filed should be made to the court of appeals in the first instance.[23] But a mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal.[24] If no motion is made in the court

14 West v. Crawford, 80 Cal. 19, 21 Pac. 1123. See Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; Neylan v. Green, 82 Cal. 128, 23 Pac. 42.

15 Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567.

16 Baer Bros. Land & Cattle Co. v. Wilson, 32 Colo. 500, 77 Pac. 245.

17 People v. Romero, 18 Cal. 90.

18 State v. Washington Ins. Co., 39 Wash. 11, 80 Pac. 803.

19 Smith v. Grant, 15 N. Y. 590; Brown v. Saratoga R. R. Co., 18 N. Y. 495

20 Swortfiguer v. White, 134 Cal. xx, 66 Pac. 80; Skinner v. Horn, 144 Cal. 278, 77 Pac. 904.

21 Hooper v. Wells, 27 Cal. 11, 85 Am. Dec. 211.

22 Boyle v. Union Pacific Ry. Co., 25 Utah, 420, 71 Pac. 988.

23 Adams v. Bush (No. 3), 2 Abb. Pr. (N. S.) 118.

24 Anderson v. Parker, 6 Cal. 197.

below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court, at appellant's cost.[25] The appellate court may order a document to be inserted in or stricken from the transcript, in order to perfect it, but it cannot amend the document itself.[26] A motion to strike the statement of facts is addressed to the supreme court, and when at the time it is made, both the statement and the transcript are still in the superior court, there is nothing on which the motion can operate.[27] The clerk's certificate to the original transcript cannot be attached to an amended transcript and be used without his knowledge and consent thereto.[28]

Motion for leave to withdraw the certificate of the clerk to the transcript of the record for the purpose of amendment comes too late when more than one year has elapsed since the rendition of the judgment from which the appeal is taken.[29] An application for order to correct an error may be made after submission of a motion to dismiss the appeal.[30] When a proposed statement of facts has been filed and certified, if no proposed amendments thereto are served within ten days, the statement as proposed shall be deemed agreed to, and shall be certified by the judge; and the court has no power to permit the withdrawal, for purposes of amendment, of a statement which has been served and filed, though the time for filing the same has not expired.[31] An appellant has the right, before the expiration of the time within which the clerk of the superior court is required by law to transmit the record to the supreme court, to cause the transcript, as originally certified by the clerk, to be supplemented so as to show, in accordance with the truth, the filing of the statement of facts, and its service on respondents, together with proof of the service of notices of the filing and settling of the same, notwithstanding a motion to strike the statement of facts for want of the above matters.[32] Where, on motion to dismiss an appeal on the ground that an order extending the time for filing the bond and bill of

25 Tryon v. Sutton, 13 Cal. 490. Neglect of appellee to file amended abstract. See Daniels v. Knight Carpet Co., 15 Colo. 56, 24 Pac. 572.

26 Bonds v. Hickman, 29 Cal. 460.

27 Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

28 Shadville v. Barker, 26 Mont. 45, 66 Pac. 496, 761.

29 Walcher v. Stone, 15 Okla. 130, 79 Pac. 771.

30 Ferrari v. Beaver Hill Coal Co. (Or.), 94 Pac. 181.

31 State v. Linn, 35 Wash. 116, 76 Pac. 513.

32 Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

exceptions had been made *ex parte*, it does not affirmatively appear from the record whether or not notice of the order was given to appellees, the latter may be given leave to apply to the lower court to amend the record to show that notice was not given.[33]

§ 1870. Briefs in alternative method of appeal. — In filing briefs in an appeal by the alternative method of preparing the record for appeal, as provided by the legislature of California in 1907, the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.[34] It is not sufficient to indicate in the briefs the portions of the record relied upon by simply citing the pages of the unprinted transcript of the phonographic report where they are to be found, instead of printing such portions in the briefs.[35] In Colorado, inserting assignments of error in a brief filed with the abstract of the record on appeal is a sufficient compliance with rule 11 of the supreme court.[36]

§ 1871. Briefs—Purpose and form.—Where a cause is instituted as an action at law, a jury waived, findings of fact and of law made by the court, judgment rendered, and a bill of exceptions settled as an action at law, but there is a controversy whether the case was an action at law or a suit in equity, it will, on appeal, be sufficiently regular for the appellant to file the first brief as if it were an action at law.[37] In Montana, an appeal from a judgment and an order denying a new trial will be affirmed where the appellant's brief does not refer to the page number in the transcript, contains no specification of errors, nor attempts to state from what either appeal was taken.[38] The rule of the supreme court requiring the findings to be printed in the brief applies only where the findings themselves are contested, and not where they are accepted as correct, and the error assigned is the conclusion of law drawn therefrom.[39]

A brief which opened with the statement that the action was one in ejectment, but did not refer to the pleadings, judgment, or

33 McKensiz v. Murphy, 29 Col. 485, 68 Pac. 838.

34 Cal. Code Civ. Proc., § 953 c; Stats. 1907, p. 751.

35 Roussin v. Kirkpatrick, 8 Cal. App. 7, 95 Pac. 1123.

36 Gilbreath v. Gilbreath, 42 Colo. 5, 94 Pac. 23.

37 Schmidtke v. Keller, 44 Or. 23, 73 Pac. 332, 74 Pac. 222.

38 Beer v. Lieneman, 26 Mont. 92, 66 Pac. 600.

39 In re City of Seattle, 26 Wash. 602, 67 Pac. 250; Cathcart v. Bryant, 28 Wash. 31, 68 Pac. 171.

orders, nor inform the court whether there was an appeal from the judgment or order denying a new trial, or both, or even that an appeal had been taken, and which, though assigning four errors on the admission and exclusion of evidence, neither set out the evidence nor referred to the pages of the transcript containing it, necessitated an affirmance of the judgment and order denying a new trial.[40]

§ 1872. **The same—Specification of errors.**—An appeal wherein the appellant's brief contains no assignment of the errors relied on will be dismissed on respondent's motion.[41] It is not necessary for the appellant to assign his reasons in the specifications of error contained in his brief.[42] It is insufficient to simply suggest in a brief that the trial court committed errors, without pointing them out specifically.[43] Under supreme court rule 8, requiring errors to be clearly pointed out in appellant's brief, a brief will not be stricken from the files where but one error is relied on, which is stated clearly at the close of the statement of facts.[44] Where alleged errors of law occurring at the trial are relied on, but the question and rulings complained of are pointed out in no other way than by reference to folios, and an examination of such folios discloses the references to have been mistakenly made, the supreme court is not obliged to search the record to find the questions and rulings.[45] An appeal will not be dismissed for failure to print in appellant's opening brief the findings of fact on which errors are assigned, where they are printed in appellant's reply brief.[46] A cross-petition in error will not be considered unless a brief is filed in support of it.[47]

40 Casey v. Thieviege, 27 Mont. 516, 71 Pac. 755; Allen v. Reely, 28 Mont. 525, 73 Pac. 118; Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25.

41 Driscoll v. Shields, 26 Mont. 494, 68 Pac. 851; Schilling v. Curran, 30 Mont. 370, 76 Pac. 998.

42 State v. Justice Court, 31 Mont. 258, 78 Pac. 498.

43 Barnes v. Benham, 13 Okla. 582, 75 Pac. 1130.

44 Brown v. Colloway, 34 Wash. 175, 75 Pac. 630; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Rowe v. Northport Smelting etc. Co., 35 Wash. 101, 76 Pac. 529; McKenzie v. Royal Dairy, 35 Wash. 390, 77 Pac. 680.

45 Bird v. Potter, 146 Cal. 286, 79 Pac. 970; Matusevitz v. Hughes, 26 Mont. 212, 66 Pac. 939, 68 Pac. 467; Warren v. Humble, 26 Mont. 495, 68 Pac. 851; Power & Bros. v. Stocking, 26 Mont. 478, 68 Pac. 857; Elliott v. Martin, 27 Mont. 519, 71 Pac. 756.

46 Timm v. Timm, 34 Wash. 228, 75 Pac. 879.

47 Iralson v. Strang, 18 Okla. 423, 90 Pac. 446; Lehane v. Butte El. Ry. Co., 37 Mont. 564, 97 Pac. 1038.

§ 1873. The same—Filing and striking out.—The time for filing briefs cannot be abridged by order of the court.[48] An appeal will be dismissed where the appellant fails, without excuse shown, to file his points and authorities within thirty days after filing the transcript, as required by the supreme court.[49] In Montana it is sixty days.[50] If appellant's points and authorities be not filed in time, the appeal may be dismissed, on motion, on notice given; but though not filed in time, if they be on file when such notice is given, that shall be a sufficient answer to the motion. Filing of the points and authorities after an abortive motion to dismiss, but before a proper motion, defeats the motion.[51] Where the appellant in a civil action fails to file briefs as required, the appeal will be dismissed.[52] But an appeal will not be dismissed for appellant's failure to serve or file briefs within the time required, nor for failing to transmit the record to the appellate court within the time fixed by law, when the delay was not prejudicial to respondent.[53] A brief will not be stricken out on the ground that it misstates the facts and misrepresents the record, where there is merely a disagreement of counsel as to the facts disclosed by the record, and no purpose of misleading the court. Where appellant's brief refers to the action of the trial court as an uncommon example of judicial ignorance, respondent's brief will not be stricken out because it refers to such language as a coarse and brutal aspersion on the trial judge. But where the trial court, on motion, discharges the jury, and directs judgment, a brief, stating that the action of the court was an uncommon example of judicial ignorance and extrajudicial assumption of power and usurpation of the functions of the jury, will be stricken from the court files.[54] An appellant's failure to comply with the court rule relative to the style of briefs, etc., does not entitle respondent to have the brief stricken and the decree affirmed, where it appears that no material injury has been effected by the non-observance of the

48 State Board of Equalization v. People, 29 Colo. 353, 68 Pac. 236.

49 Coats v. Coats, 146 Cal. 443, 80 Pac. 694; McCabe v. Healey, 139 Cal. 30, 72 Pac. 359.

50 Butler v. McCormick, 27 Mont. 515, 71 Pac. 764.

51 Swortfiguer v. White, 137 Cal. 391, 70 Pac. 214.

52 Alva State Bank v. Renfrew, 10 Okla. 25, 66 Pac. 803; Stallard v. Hagar, 14 Okla. 608, 78 Pac. 323; Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Knobb v. Reed, 28 Mont. 42, 72 Pac. 304.

53 Gay v. City of New Whatcom, 26 Wash. 389, 67 Pac. 88.

54 Sawdey v. Spokane Falls etc. Ry. Co., 27 Wash. 536, 67 Pac. 1094.

rule.[55] A failure to controvert appellee's statement may be fatal to appellant.[56] Statements of fact made by counsel in a brief on appeal can be considered as an admission made on the trial of the case.[57] Under section 460 of the Political Code of Montana, making the attorney-general the attorney of record for any county, he is entitled to be served with a copy of the brief on an appeal by plaintiff in an action against a county.[58] Respondent's brief will be stricken from the files when filed more than thirty days after appellant's brief has been served upon him.[59] A failure to file a brief is a waiver of the right to be heard on appeal.[60] Where a showing made by counsel for plaintiff in error for failure to file briefs in the time required by the rules does not show such an unavoidable casualty or overwhelming necessity as would justify a disregard of rules, it is insufficient to warrant an extension of time for filing, as against a motion by the opposing side to dismiss the proceeding because of such failure.[61]

§ 1874. Argument of counsel.—No more than two counsel on a side will be heard upon the argument, unless otherwise ordered by the court.[62] The counsel for the appellant shall be entitled to open and close the argument.[63] The appellant is confined in his argument to the objections urged in the court below.[64] Where the transcript discloses a subject-matter of appeal of which no mention is made in the briefs of counsel, it will be assumed by the appellate court that the questions involved in it have been abandoned.[65] The respondent may suggest any ground to show that the ruling of the court below was right, whether the grounds

55 Jones v. Herrick, 33 Wash. 197, 74 Pac. 332.

56 Hart v. Peet, 18 Colo. App. 284, 71 Pac. 400.

57 Territory v. Board of Commissioners, 13 N. Mex. 89, 79 Pac. 709.

58 McIntosh Hardware Co. v. Flathead County, 32 Mont. 254, 80 Pac. 239.

59 Knobb v. Reed, 28 Mont. 42, 72 Pac. 304.

60 Le Breton v. Swartzel, 14 Okla. 521, 78 Pac. 323.

61 Cook v. South Omaha Nat. Bank, 13 Wyo. 187, 79 Pac. 18.

62 Cal. Sup. Ct. rule 19. Privilege of oral argument on final hearing. De Votie v. McGerr, 14 Colo. 577, 23 Pac. 980; Butler v. Rockwell, 17 Colo. 290, 29 Pac. 458, 17 L. R. A. 611.

63 Cal. Sup. Ct. rule 2; Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342.

64 Clarke v. Huber, 25 Cal. 593; Edgerton v. Thomas, 9 N. Y. 42; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Durgin v. Ireland, 14 N. Y. 322; Codd v. Rathbone, 19 N. Y. 27; Savage v. Cock, 17 Abb. Pr. 403; Stewart v. Smith, 14 Abb. Pr. 75.

65 Tuller v. Arnold, 98 Cal. 522, 33 Pac. 445; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431.

suggested were advanced in the court below or not.[66] Or he may insist on a point properly presented, although it was not urged in the trial of the cause.[67] When counsel assume a certain principle advanced as correct law, and the court decides the case upon this assumption, without discussing its correctness, the opinion is not authority that such assumption is correct law.[68]

§ 1875. Objections to the transcript.—The party making and presenting a case on appeal is chargeable with all errors, and it is not sufficient to say that a defect in the record is a mistake of the stenographer.[69] Exceptions or objections to the transcript or statement, the bond or undertaking on appeal, the notice of appeal or its service, or any technical objection or exception to the record, affecting the right of the appellant to be heard on the points of error assigned, which might be cured upon suggestion must be taken and notified to the appellant in writing at least five days before the hearing.[70] So of the objection that it does not contain all that is required by section 346 of the California Practice Act (which corresponds to sections 950 to 954 of the Code of Civil Procedure).[71] Where, upon notice to appellees, who did not appear, the appellant procured an order extending the time for filing a bill of exceptions, a motion to strike the bill because the order was not granted until after the time for filing had passed, made after the transcript of the record, the abstract of the record, and the brief of appellant were filed, is too late, and will not be considered.[72] The objection that it does not appear in the transcript when the statement or motion for new trial was filed in the court below must be made in the supreme court before a submission of the case on the merits, or it will be deemed waived.[73] If a case is submitted on its merits by consent of counsel, the submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript.[74] If the transcript cannot be made out, by reason of the loss of a portion of the records of the case, it is the duty of the appellant to move the court below, at the earliest possible time, to supply the lost papers by some

66 Clarke v. Huber, 20 Cal. 196.
67 Kidd v. Teeple, 22 Cal. 255.
68 Donner v. Palmer, 31 Cal. 500.
69 Thompson v. Cade, 14 Okla. 337, 79 Pac. 96.
70 Cal. Sup. Ct. rule 15.
71 Solomon v. Reese, 34 Cal. 28.
72 Merriner v. Jeppson, 19 Colo. App. 218, 74 Pac. 341.
73 Ross v. Roadhouse, 36 Cal. 580.
74 St. John v. Kidd, 26 Cal. 263.

means under its control,[75] as by copies from the original.[76] That the transcript of a record in a case on appeal is incomplete cannot be shown by certificate of the clerk.[77]

In case of a stipulation of attorneys that "the foregoing transcript is correct," the respondent's objections to the sufficiency of the transcript are not waived by his failing to take exception thereto, according to rule 15 of the supreme court of California.[78] On an appeal from a judgment by default against a non-resident, an objection that the record does not contain the affidavit on which an attachment in the suit issued is not well taken.[79] On an appeal from a judgment by default not taken within sixty days after the entry of judgment, nothing can be reviewed except what appears on the judgment-roll.[80] If a part of the judgment appealed from is omitted in the record, the supreme court may require it to be supplied on the suggestion of the diminution of the record;[81] or the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking not shown by the transcript to have been filed.[82] The fact that the record is erroneous cannot be shown by an affidavit of the judge who tried the cause.[83] Although the court may disapprove of the manner of taking an appeal, yet if counsel make no objection the defect will not be considered.[84] A motion in the appellate court to strike out portions of the transcript, upon the ground that they are no part of the record, is not proper practice, and will be denied. If the matters sought to be stricken out form no part of the record, they will not be considered by the court upon the hearing of the case

75 Buckman v. Whitney, 24 Cal. 267.

76 Buckman v. Whitney, 28 Cal. 555.

77 The Grapeshot, 7 Wall. 563, 19 L. Ed. 83.

78 Todd v. Winants, 36 Cal. 129. See Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

79 Dow v. Whitman, 36 Ala. 604.

80 Savings etc. Soc. v. Meeks, 66 Cal. 371, 5 Pac. 624.

81 McGarrahan v. Maxwell, 28 Cal. 75; Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131.

82 Wakeman v. Coleman, 28 Cal. 58.

83 Smith v. Brannan, 13 Cal. 107. As to the practice in correcting errors or defects in the transcript, see Cal. Sup. Ct. rule 15; McGregor v. Comstock, 19 N. Y. 581; Paige v. Roeding, 96 Cal. 388, 31 Pac. 264; Fagan v. Carty, 77 Cal. 352, 19 Pac. 584; Lee Chuck v. Quan Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594; Ingerman v. Moore, 90 Cal. 416, 25 Am. St. Rep. 138, 27 Pac. 306; Territory v. Harris, 7 Mont. 429, 17 Pac. 557.

84 Boyd v. Slayback, 63 Cal. 493. As to unauthorized reconstruction of record, see McDonald v. Shreve, 12 Mont. 82, 29 Pac. 729.

upon its merits.[85] It will require a strong showing to justify the court to permit additions to the transcript of matters before deliberately omitted.[86] The supreme court has no authority to correct the records in the lower courts. Applications to correct errors in the records of superior courts, if any exist, must be made in lower courts.[87] Where there is a substantial defect in the appeal, the objection may be taken at any time before judgment.[88] If the defect of jurisdiction appear on the transcript, it cannot be cured by amendment, as consent of parties will not confer jurisdiction on appeal.[89] But when a case is brought up on appeal for the second time, it is too late to object that the court had not jurisdiction to try the first appeal.[90]

§ 1876. Authentication of papers.—Without a statutory provision authorizing the authentication of copies of papers in some other way, the only proper way that they can be brought into the record upon appeal and identified is by bill of exceptions or statement.[91] An appellant may cause the original record to be supplemented, after it has been sent up, so as to show the filing of the statement of facts, its service on respondents, and proof of the filing and settling of the same, notwithstanding a motion to strike the statement of facts for want of such matters.[92] Cases appealed to the supreme court must be heard and decided on the record made in the trial court.[93] Where there is no properly certified

85 Sutton v. Symons, 97 Cal. 475, 32 Pac. 588. As to striking documents from record under Washington practice, see Chapin v. Bokee, 4 Wash. 1, 29 Pac. 936; Medcalf v. Bush, 4 Wash. 386, 30 Pac. 325; King County v. Hill, 1 Wash. 63, 23 Pac. 926. Bill of exceptions not stricken from record, when, see Parrott v. Kane, 14 Mont. 23, 35 Pac. 243. As to dismissal of appeal for insufficiency of transcript, see Miller v. Thomas, 78 Cal. 509, 21 Pac. 11. For Colorado supreme court practice as regards defective records, see Pleyte v. Pleyte, 15 Colo. 44, 24 Pac. 579.

86 Ketchum v. Crippen, 31 Cal. 305.

87 Boston v. Haynes, 31 Cal. 107; Roe v. Superior Court, 60 Cal. 93.

88 Denedle v. Archer, 8 Pet. 526, 8 L. Ed. 1133; Owings v. Kincannon, 7 Pet. 399, 8 L. Ed. 727; Wilson v. Life etc. Ins. Co., 12 Pet. 140, 9 L. Ed. 1032.

89 Mordecai v. Lindsay, 19 How. 200, 15 L. Ed. 624; Montgomery v. Anderson, 21 How. 386, 16 L. Ed. 160; Ballance v. Forsyth, 21 How. 389, 16 L. Ed. 143.

90 Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658; Sizer v. Many, 16 How. 98, 14 L. Ed. 861.

91 Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299; Somers v. Somers, 81 Cal. 608, 22 Pac. 967. Compare Miller v. Lux, 100 Cal. 609, 35 Pac. 345, 639.

92 Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

93 Boyle v. Union Pacific Ry. Co., 25 Utah, 420, 71 Pac. 988.

copy of the notice of appeal in the record of the appeal, the appellant, on motion, may be authorized to complete the record by supplying the defect.[94] Although the transcript on appeal may be properly certified, yet where the bill of exceptions accompanying it is a detached paper, without authentication, the appellate court will ignore the errors shown in the bill.[95] The certificate that the statement in a cause of equitable cognizance contains all the material facts, is sufficient without alleging that it contains the exceptions taken to the reception or rejection of testimony, when it does not appear that any material matter has been omitted from the statement.[96] In the authentication of papers to be used on appeal, the policy of the statute is to restrict the authority of the clerk to the record of the case.[97]

§ 1877. **Printing record.**—Under a statute of New Mexico,[97a] requiring the record on appeal to be printed where the amount in controversy exceeds one thousand dollars, the court has no right to compel the printing where the amount involved is less than that sum.[98]

§ 1878. **Transcript—Fees and costs.**—The written transcript in civil cases may be filed with the clerk of the court, if, when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing, and the clerk, upon receipt thereof, shall cause the transcript to be printed, etc.[99] It is held that this rule should be strictly enforced and obeyed as written, and that a deposit of the transcript with the clerk, without the funds necessary to pay for the printing, is not in compliance with the rule.[100] The Washington appeal act of 1891 made it the duty of the clerk to transcribe all the papers on the taking of an appeal, and fees therefor must be allowed in the supreme court, although much of the matter may be unnecessary for the hearing on appeal.[101] Where the appellant himself prepares the transcript, and is charged only half price by the clerk for examining and certifying

94 Swortfiguer v. White, 134 Cal. xx, 66 Pac. 80.

95 Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287. See Richwine v. Jones, 140 Ind. 289, 39 N. E. 460.

96 Tompson v. Huron Lumber Co., 5 Wash. 527, 32 Pac. 536.

97 Thompson v. Reno Sav. Bank, 19 Nev. 293, 9 Pac. 883.

97a Comp. Laws, § 2201.

98 Mora v. Schick, 4 N. Mex. 158, (301), 13 Pac. 341; Deemer v. Falkenburg, 4 N. Mex. 57 (149), 12 Pac. 717.

99 Cal. Sup. Ct. rule 12.

100 Ward v. Healy, 110 Cal. 587, 42 Pac. 1071.

101 Soules v. McLean, 7 Wash. 451, 35 Pac. 364, 1082.

the same, he can recover as costs merely the sum paid to the clerk, and is entitled to nothing on account of his own labor upon the transcript.[102] In case of a judgment reversed, additional costs will not be imposed on the respondents on account of their inserting in the transcript a large amount of unnecessary matter, since by the reversal they will be required to pay the expenses of printing the same.[103]

§ 1879. Dismissal of appeal.—If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of motion is given, that fact shall be a sufficient answer to the motion.[104] An appeal will be dismissed in certain cases where documents offered in evidence below are not found in the record;[105] or for want of assignment of errors.[106] But if the order of dismissal is procured by any fraud or imposition practiced on the court or the opposite party, the supreme court will recall the *remittitur*, stay the proceedings, and assert its jurisdiction, even after the adjournment of the term.[107] Plaintiff in error may dismiss his writ of error, even though defendant has assigned cross-errors, if defendant will not be prejudiced by such dismissal.[108] No appeal shall be dismissed for insufficiency of the undertaking thereon, provided that a good and sufficient undertaking, approved by a judge of the supreme court or the appellate

102 Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055.

103 In re Robinson, 106 Cal. 493, 39 Pac. 862.

104 Cal. Sup. Ct. rule 5; Gregory v. Diggs, 108 Cal. 123, 41 Pac. 34; Smith v. Trefry, 71 Cal. 404, 12 Pac. 351; Whartenby v. Reay, 92 Cal. 74, 28 Pac. 56; Judge v. Ohm, 89 Cal. 134, 26 Pac. 649; Hoyt v. San Francisco etc. R. R. Co., 87 Cal. 610, 25 Pac. 160, 1066; Coffey v. Grand Council, 87 Cal. 370, 25 Pac. 548; Buckley v. Althorf, 86 Cal. 643, 25 Pac. 134; Smith v. Solomon, 84 Cal. 537, 24 Pac. 286; Owen v. Going, 13 Colo. 290, 22 Pac. 768; Tustin v. McFarland, 4 Wash. 103, 29 Pac. 929; Higgins v. Burns, 2 Wash. 372, 26 Pac. 755; Edison etc. Illuminating Co. v. Needham, 2 Wash. 450, 27 Pac. 271; Oregon Ry. etc. Co. v. O'Brien, 3 Wash. T. 21, 13 Pac. 757; Savings Bank v. Morgan, 9 Utah, 369, 36 Pac. 632; Bonesteel v. Fairchild, 9 Utah, 371, 36 Pac. 633. For proceedings on motion to dismiss, consult Cal. Sup. Ct. rule 6; Pio v. Aigeltinger, 97 Cal. 81, 31 Pac. 895; Cochrane v. Gunderson, 10 Wash. 326, 38 Pac. 997.

105 Hall v. Beggs, 17 La. Ann. 130.

106 Brooks v. Townsend, 4 Cal. 286; Savage v. Maresch, 3 Wash. T. 259, 21 Pac. 386; Frazier v. Venen, 3 Wash. T. 392, 17 Pac. 885.

107 Rowland v. Kreyenhagen, 24 Cal. 52; Martinez v. Galardo, 5 Cal. 155.

108 Fahey v. Fahey, 32 Colo. 25, 74 Pac. 884.

court, be filed in the supreme court or appellate court before the hearing in that court, upon motion to dismiss the appeal; and if the undertaking become insufficient by death of sureties or otherwise, the court, or one of the justices, may upon satisfaction thereof, order a new undertaking to be filed to maintain the appeal.[109] In case the filing of notice of appeal did not precede the filing of the undertaking, the appeal will be dismissed, but usually without prejudice to a second appeal.[110] So because the undertaking was not filed within five days after notice of appeal was filed.[111] Where appellant's appeal has been imperfectly made or settled, it will be, on motion, dismissed;[112] or where the appeal is defective for want of jurisdiction;[113] or where the order or decree appealed from is unappealable;[114] or where the appeal is brought too late, or prematurely;[115] or where no regular case is presented.[116] Where an appeal originally good is lost by change in the law, it will be dismissed on motion;[117] or where an appeal

109 Cal. Code Civ. Proc., § 954.

110 Carpentier v. Williamson, 24 Cal. 609; Dooling v. Moore, 19 Cal. 81.

111 Gordon v. Wansey, 19 Cal. 82.

112 Livingston v. Radcliff, 2 N. Y. 189; Sturgis v. Merry, 2 N. Y. 189; King v. Dennis, 2 N. Y. 189; Colie v. Brown, 1 N. Y. Code Rep. (N. S.) 416; Hunt v. Bloomer, 13 N. Y. 341; Johnson v. Whitlock, 13 N. Y. 344; Zabriskie v. Smith, 11 N. Y. 480.

113 Pugsley v. Kesselburgh, 10 N. Y. 420; Wiggins v. Tallmadge, 7 How. Pr. 404; Lalliette v. Van Keuren, 7 How. Pr. 409.

114 Smith v. White, 23 N. Y. 572; Moore v. Westervelt, 1 N. Y. Code Rep. (N. S.) 415; Wait v. Van Allen, 22 N. B. 319; Genin v. Tomkins, 1 N. Y. Code Rep. (N. S.) 415; Ely v. Holton, 15 N. Y. 595; McAllister v. Albion Plank Road Co., 10 N. Y. 353; Matter of Canal and Walker Streets, 12 N. Y. 406; New York Cent. R. R. Co. v. Marvin, 11 N. Y. 276; Adams v. Fox, 27 N. Y. 640; Wiggins v. Tallmadge, 7 How. Pr. 404; Lahens v. Fielden, 15 Abb. Pr. 177.

115 Bank of Geneva v. Hotchkiss, 5 How Pr. 478; Wells v. Danforth, 7 How. Pr. 197; Woollen Mfg. Co. v. Townsend, 1 N. Y. Code Rep. (N. S.) 415; McMahon v. Harrison, 5 How. Pr. 360; Mills v. Shult, 2 E. D. Smith, 139. As to dismissal for delay see Bordeul v. Denn, 106 Cal. 594, 39 Pac. 946; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206; McLaughlin v. Menotti, 89 Cal. 354, 26 Pac. 880; Langan v. Langan, 89 Cal. 186, 26 Pac. 764; Kirman v. Hunnewill, 191 Cal. 157, 27 Pac. 587; Himebaugh v. Crouch, 3 S. Dak. 409, 53 N. W. 862; Citizens' Bank v. Crouch, 3 S. Dak. 410, 53 N. W. 862; Ryan etc. Cattle Co. v. Murdock, 8 Utah, 497, 33 Pac. 136. Laches of both parties not ground for dismissal, when, see Tripp v. Duane, 86 Cal. 149, 24 Pac. 867.

116 Westcott v. Thompson, 16 N. Y. 613; Hunt v. Bloomer, 13 N. Y. 341; Johnson v. Whitlock, 13 N. Y. 344; Otis v. Spencer, 16 N. Y. 610; Ingersoll v. Bostwick, 22 N. Y. 425.

117 Gale v. Wells, 7 How. Pr. 191; Porter v. Jones, 7 How. Pr. 192.

is brought in bad faith, or in violation of a stipulation;[118] or where, pending the appeal, the controversy had been settled;[119] or where, by enforcement of a portion of the judgment, appellant had waived his right to appeal;[120] or where appellant has no right to appeal at all.[121] But that appellant has no interest in the subject-matter of the suit is no ground for dismissal, even on a second appeal after judgment reversed.[122] An appeal taken before the judgment is entered of record is premature, and must be dismissed.[123]

In case of a second appeal, where the costs of the first appeal have not been paid, appeal will be stayed until the costs are paid.[124] Where the appellant does not furnish the papers necessary to inform the court of the nature of the appeal, the cause will be dismissed.[125] Where appellant failed to file a transcript of the record showing that an appeal has been perfected, and respondents filed an affidavit that the appeal was taken for delay, the appeal was dismissed, with ten per cent damages.[126] Upon the dismissal of an appeal for want of prosecution, in giving judgment against the sureties upon the appeal-bond, damages will not be allowed when no showing of special damages has been made by the respondent.[127] On an appeal from an order denying a new trial, appellant failing to furnish the supreme court with a copy of the papers used on hearing the motion, the appeal will be dismissed on motion.[128] On motion to dismiss an appeal, on the ground that an undertaking on appeal is not shown in the transcript, appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify

118 Townsend v. Masterson Stone Dressing Co., 15 N. Y. 587.

119 Shank v Shoemaker, 18 N. Y. 489; Smith v. Hart, 11 How. Pr. 203.

120 Bennett v. Van Syckel, 18 N. Y. 481.

121 Matter of Bristol, 16 Abb. Pr. 397.

122 Ricketson v. Compton, 23 Cal. 636.

123 Home of Inebriates v. Kaplan, 84 Cal. 486, 24 Pac. 119. See Bartlett v. Reichennecker, 5 Wash. 369, 32 Pac. 96.

124 Dresser v. Brooks, 5 How. Pr. 75. As to costs of appeal, see Cramer v. Tittle, 79 Cal. 332, 21 Pac. 750; Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328; Dalbkermeyer v. Scholtes, 3 S. Dak. 183, 52 N. W. 871.

125 Sun Mut. Ins. Co. v. Dwight, 1 Hilt. 50.

126 Buckley v. Stebbins, 2 Cal. 149; fifteen per cent awarded in De Witt v. Porter, 13 Cal. 171; twenty per cent in Nickerson v. California Stage Co., 10 Cal. 520; twenty-five per cent in McKeon v. Millard, 47 Cal. 583.

127 Cady v. Case, 10 Wash. 140, 38 Pac. 880.

128 Bodley v. Ferguson, 25 Cal. 584. See, also, People v. Baker, 39 Cal. 686.

a copy of the undertaking to the appellate court.[129] Where the undertaking is sufficient to render the appeal effectual, but is not sufficient to operate as a stay, respondent may move for leave to proceed in the judgment, but not to dismiss the appeal.[130] Where an appeal has been dismissed for want of a proper bond, and no final judgment rendered, a second appeal can be taken at any time within the period allowed by law.[131] A motion to dismiss an appeal, on the ground that the transcript was not filed within the time required by the California supreme court rules, is too late after the case has been submitted.[132] A dismissal of an appeal, from failure to file the record within the time required, is not an affirmance of the judgment.[133] If the appellant neglects to file a brief within the time fixed, and the transcript contains no assignment of errors, except the general one that the order or judgment appealed from is not warranted by the evidence, the appeal, on motion, will be dismissed.[134] A defendant who appeared separately, and was not served with notice of appeal, or made a party to any proceedings subsequent to the judgment, cannot move to dismiss an appeal taken by another defendant.[135] An appeal will be dismissed if a copy of the notice of appeal is served before the day on which the original is filed.[136] If there is no actual controversy, the appeal will be dismissed.[137]

Mere delay is no ground for dismissal of appeal,[138] nor that an appeal is sham and frivolous.[139] To dismiss an appeal is to refuse to consider its merits, and, therefore, there can be no dismissal on the ground that the appeal is frivolous or without merit.[140] Where it is evident that an appeal is frivolous, and taken purely for delay,

129 Wakeman v. Coleman, 28 Cal. 58.

130 Dobbins v. Dollarhide, 15 Cal. 374.

131 Martinez v. Galardo, 5 Cal. 155; Columbet v. Pacheco, 46 Cal. 650.

132 Cook v. Klink, 8 Cal. 347.

133 United States v. Gomez, 23 How. 326, 16 L. Ed. 552.

134 Williams v. Hall, 24 Cal. 156.

135 Blanc v. Rodgers, 47 Cal. 606.

136 Buffendeau v. Edmondson, 24 Cal. 94. But see Cal. Code Civ. Proc., § 940.

137 State Board of Equalization v. People, 30 Colo. 271, 70 Pac. 416; City of Wallace v. Deane, 8 Idaho, 344, 69 Pac. 62; Crouse v. Nixon, 65 Kan. 843, 70 Pac. 885; In re Black's Estate, 32 Mont. 51, 79 Pac. 554; White Crest Canning Co. v. Sims, 29 Wash. 389, 69 Pac. 1094; State v. Sunset Tel. etc. Co., 30 Wash. 676, 71 Pac. 198; Littleton v. Burgess, 13 Wyo. 261, 79 Pac. 922.

138 Dey v. Walton, 2 Hill, 403.

139 Ricketson v. Compton, 23 Cal. 636; Dey v. Walton, 2 Hill, 403; Rogers v. Hoosack, 5 Hill, 521.

140 People v. McNulty, 95 Cal. 594, 30 Pac. 963.

the appellant will be mulcted in damages.[141] An appeal will not be dismissed for clerical errors in the record;[142] nor because the security was not sufficient to entitle the party to a *supersedeas;*[143] but if the appellant has become possessed of all the appellee's interest, appeal will be dismissed.[144] A motion to dismiss an appeal will not be entertained, even upon the ground that the appeal is frivolous, until after the time for filing the transcript has expired.[145] On an appeal from a judgment and an order denying a new trial, the undertaking recited the judgment, but no mention was made of the order. The appeal from the order was dismissed for want of an undertaking, and the appeal from the judgment was dismissed because not taken within one year.[146] Where the record showed that no appeal had been taken by reason of failure to serve notice of appeal in time, a motion to dismiss the appeal will be denied.[147]

§ 1880. **The same—Continued.**—The appellate court will dismiss an appeal of which it has no jurisdiction,[148] and may entertain a motion for such dismissal.[149] An appeal will be dismissed when it appears that the judgment has been satisfied;[150] so when it is shown by satisfactory evidence that the appeal was taken or is being prosecuted without authority, and against the desire or wish, of the appellant;[151] so where no sufficient undertaking is filed;[152] or where an undertaking is filed before the notice of

141 Muller v. Rowell, 110 Cal. 318, 42 Pac. 804.

142 Adams v. Law, 16 How. 144, 14 L. Ed. 880.

143 Hudgins v. Komp, 18 How. 530, 15 L. Ed. 511; Anson v. Blue Ridge R. R. Co., 23 How. 1, 16 L. Ed. 517.

144 Cleveland v. Chamberlain, 1 Black, 419, 17 L. Ed. 93.

145 Foscalina v. Doyle, 48 Cal. 151.

146 Bornheimer v. Baldwin, 38 Cal. 671.

147 Harlan v. Pratt, 50 Cal. 94.

148 Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 Pac. 1113; State v. Kemp, 5 Wash. 212, 31 Pac. 711; Names v. Names, 74 Iowa, 213, 37 N. W. 163.

149 Rhyne v. Manchester etc. Co., 14 Okla. 555, 78 Pac. 558; Booher v. Wisner, 65 Kan. 860, 70 Pac. 581; Dechenbach v. Rima, 45 Or. 500, 77 Pac. 391, 78 Pac. 666.

150 People v. Burns, 78 Cal. 645, 21 Pac. 540; Estate of Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; Nunan v. Valentine, 83 Cal. 588, 23 Pac. 713.

151 Dalbkermeyer v. Scholtes, 3 S. Dak. 124, 52 N. W. 261.

152 Cronin v. Bear Creek Gold Min. Co., 3 Idaho, 438, 32 Pac. 53; In re Danielson, 88 Cal. 480, 26 Pac. 505; Pacific Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650; Perkins v. Cooper, 87 Cal. 241, 25 Pac. 411; Fogel v. Schmalz, 83 Cal. 201, 23 Pac. 294; Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; McCormick v. Belvin, 96 Cal. 182, 31 Pac. 16; State v. Fisher, 4 Wash. 382, 30 Pac. 502; Fisher v. Fisher, 9 Wash. 694, 38 Pac. 133;

appeal is served.[153] But an appeal will not be dismissed on account of a defective bond, until the defect has been adjudged and an opportunity given the appellant to amend.[154] An appeal may be dismissed for non-compliance with the rules of court as to the mode of its presentation.[155] Failure to serve notice of the appeal is ground for dismissal;[156] so if the notice of appeal was served and filed prior to the entry of the judgment;[157] but failure to serve notice of appeal upon a defendant who does not appear in the action is not ground for dismissal.[158] There may be dismissal of appeal for failure to serve and file transcript,[159] abstract of record,[160] or briefs, in accordance with rules of court,[161] or where the transcript is defective.[162] But the fact that the appellant's brief does not designate all of the defendants as respondents is not ground for dismissing the appeal, if the notice of appeal was properly entitled and was served upon all the parties appearing in the action.[163] An appeal may be dismissed on admission of

See Moyle v. Landers, 78 Cal. 99, 12 Am. St. Rep. 22, 20 Pac. 241.

153 Hawthorne v. East Portland, 12 Or. 210, 6 Pac. 685; contra, Runyan v. Russell, 3 Wash. 665, 29 Pac. 348.

154 Miller v. Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; Pierce v. Miles, 5 Mont. 549, 6 Pac. 347. See Swasey v. Adair, 83 Cal. 136, 23 Pac. 284.

155 Henry v. Traveler's Ins. Co., 16 Colo. 179, 26 Pac. 318; Alder etc. Min. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Shain v. People's Lumber Co., 98 Cal. 120, 32 Pac. 878.

156 First Nat. Bank v. McLean, 6 Wash. 296, 32 Pac. 1060; Johnson v. Lighthouse, 8 Wash. 32, 35 Pac. 403; Webber v. Brieger, 1 Colo. App. 92, 27 Pac. 871.

157 People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Tyrrell v. Baldwin, 72 Cal. 192, 13 Pac. 475; Dwyer v. Schlumpf, 6 Wash. 25, 32 Pac. 1005.

158 Essency v. Essency, 10 Wash. 375, 38 Pac. 1130. See Traders' Bank v. Bokien, 5 Wash. 777, 32 Pac. 744; Brown v. Rouse, 93 Cal. 237, 28 Pac. 1044; Jackson v. Brown, 82 Cal. 275, 23 Pac. 142.

159 Raymond v. McMullen, 90 Cal. 122, 27 Pac. 21; White v. White, 112 Cal. 577, 44 Pac. 1026; Rumfelt v. Trinity River Canal etc. Co., 83 Cal. 649, 24 Pac. 276; Westheimer v. Thompson, 3 Idaho, 418, 31 Pac. 797.

160 Buckey v. Phenicie, 4 Colo. App. 204, 35 Pac. 277; Hammond v. Herdman, 3 Colo. App. 379, 33 Pac. 933.

161 Emerick v. Ogden City, 9 Utah, 372, 36 Pac. 633; Howlett v. Tuttle, 10 Colo. 222, 15 Pac. 342; Lyen v. Bond, 3 Wash. T. 407, 19 Pac. 35; McDonald v. McLeod, 3 Colo. App. 344, 33 Pac. 285.

162 Owsley v. Warfield, 7 Mont. 102, 14 Pac. 646; Lewis v. Host, 2 Wash. T. 402, 7 Pac. 858; Wheeler v. Lager, 3 Wash. 732, 29 Pac. 453; In re Siering, 90 Cal. 207, 27 Pac. 204; Adams v. McPherson, 3 Idaho, 117, 27 Pac. 577; Rotch v. Hamilton, 7 Utah, 513, 27 Pac. 694; Brick Co. v. Dubois, 10 Utah, 60, 37 Pac. 90; State v. Lamb, 20 Nev. 181, 19 Pac. 33.

163 Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140. As to dismissal of appeal by reason of defective transcript, see Richardson v. City of Eureka, 92 Cal. 64, 28 Pac. 102; Howell v. Howell, 101 Cal. 115, 35 Pac. 443;

the appellant that the demurrer was properly sustained;[164] or for neglect of the appellant;[165] or because the appellant was not a party aggrieved;[166] and if there is no question involved in an appeal which is not controlled by the statement of facts, the striking of the statement from the record will work a dismissal of the appeal.[167] An appeal by and in the name of an administrator, taken after he has been fully discharged as such administrator, and a new administrator has been appointed and qualified, gives the appellate court no jurisdiction over the estate, or of a cause of action against the estate, and will be dismissed.[168]

§ 1881. **The same—Dismissal denied.**—An appeal will not be dismissed for failure by appellant to serve appellee with copies of the record, as required by rule of court, unless the appellee takes advantage of such failure in the manner and at the time prescribed in the rule.[169] Nor will an appeal be dismissed for failure of appellants to except to findings or to ask for further findings, nor, under Montana practice, for failure to file briefs within the time required by the rules of court.[170] And although a transcript has not been filed, or has not been filed within the time prescribed, yet if a good and satisfactory excuse is shown for the failure, the appeal will not be dismissed.[171] An appeal will not

Green v. McMann, 79 Cal. 561, 21 Pac. 964; Beets v. Chart, 79 Cal. 185, 21 Pac. 730; Woodside v. Hewel, 107 Cal. 141, 40 Pac. 103. As to omission of part of judgment-roll from transcript, see Paige v. Roeding, 89 Cal. 69, 26 Pac. 787. As to absence of exceptions, see Randall v. Duff, 105 Cal. 271, 38 Pac. 739. As to want of certificate to transcript, see In re Wierbitsky, 88 Cal. 333, 26 Pac. 174. As to interlineations and erasures in transcript, see Fogel v. Schmalz, 83 Cal. 201, 23 Pac. 294; Rotch v. Hamilton, 7 Utah, 513, 27 Pac. 694.

164 State v. Smith, 7 Wash. 194, 34 Pac. 915.

165 Bethell v. Rogers, 100 Cal. 175, 34 Pac. 645.

166 Rankin v. Central Pacific R. R. Co., 73 Cal. 96, 15 Pac. 57; Goldtree v. Thompson, 83 Cal. 420, 23 Pac. 383.

167 McQuillan v. City of Seattle, 7 Wash. 331, 35 Pac. 68; Watt v. O'Brien, 6 Wash. 415, 33 Pac. 969; Gordon v. Nelson, 4 Wash. 817, 30 Pac. 647.

168 McCormick etc. Mach. Co. v. Snedigar, 3 S. Dak. 302, 53 N. W. 83.

169 Mora v. Schick, 4 N. Mex. 158 (301), 13 Pac. 341.

170 Logan v. Rickards, 14 Mont. 334, 36 Pac. 318.

171 See Poupion v. Muzio, 68 Cal. 235, 9 Pac. 97; In re Burton, 93 Cal. 613, 29 Pac. 224; Hubback v. Ross, 79 Cal. 564, 21 Pac. 965; McGrath v. Hyde, 71 Cal. 454, 12 Pac. 497; Grant v. De Lamori, 71 Cal. 329, 12 Pac. 228; Dorn v. Baker, 92 Cal. 194, 28 Pac. 225; Mill Co. v. Johnston, 5 Utah, 147, 13 Pac. 17; Gustin v. Jose, 10 Wash. 217, 38 Pac. 1008; Benn v. Chehalis County, 10 Wash. 294, 38 Pac. 1039; Fox v. Utter, 6 Wash. 299, 33 Pac. 354; Barnhart v. Fulkerth, 92 Cal. 155, 28 Pac. 221. As to in-

be dismissed because taken before the costs and disbursements in the court below are taxed and inserted in the entry of the judgment appealed from.[172] Under the Utah procedure, an appeal from the judgment will not be dismissed because an appeal from the order denying a new trial in the same case is before the court.[173] When an appeal has been legally taken from an order of the superior court, the lack of a bill of exceptions embodying and authenticating its proceedings is not a ground for dismissing the appeal.[174] An appeal from a judgment entered in the court below under the direction of the appellate court, upon a former appeal, cannot be dismissed upon the ground that such judgment is not appealable.[175] The fact that papers printed in the transcript are not identified as having been used on the motion on which the order appealed from was made will not justify a dismissal of the appeal.[176] Nor is it ground for dismissal that the statement on motion for a new trial was not served on all the adverse parties, when the parties not served are not interested in the appeal.[177] And motion to dismiss an appeal because no notice of motion for a new trial appeared in the record, was denied.[178] When the appellant is an executor, a motion to dismiss the appeal because of the failure to file an undertaking on the appeal will be denied.[179] A second motion to dismiss an appeal made for a cause existing when the first motion to dismiss was made will not be entertained.[180]

§ 1882. Dismissal, effect of.—Dismissal for want of prosecution operates as an affirmance of the judgment, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term;[181] or where the dismissal is on the

sufficient excuse, see Shepherd v. Shepherd, 4 Wash. 615, 30 Pac. 664; County of Chehalis v. Pearson, 10 Wash. 216, 38 Pac. 996; Murphy v. Ross, 2 Wash. 327, 26 Pac. 222.

172 Williams v. Wait, 2 S. Dak. 210, 39 Am. St. Rep. 768, 49 N. W. 209. See Richardson v. Rogers, 37 Minn. 463, 35 N. W. 270.

173 Kelly v. Kershaw, 5 Utah, 300, 14 Pac. 808.

174 Howell v. Howell, 101 Cal. 115, 35 Pac. 443.

175 Randall v. Duff, 107 Cal. 33, 40 Pac. 20.

176 Herrlich v. McDonald, 72 Cal. 579, 14 Pac. 357.

177 Dore v. Dougherty, 72 Cal. 232, 1 Am. St. Rep. 48, 13 Pac. 621.

178 Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855; following Pico v. Cohn, 78 Cal. 384, 20 Pac. 706.

179 Kirsch v. Derby, 93 Cal. 573, 29 Pac. 218.

180 Stevens v. Higgenbotham, 6 Utah, 341, 23 Pac. 757.

181 Karth v. Light, 15 Cal. 324; Rowland v. Kreyenhagen, 24 Cal. 52; Chamberlin v. Reed, 16 Cal. 207.

merits.[182] Where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like, it is not a bar.[183] It has been held that after the dismissal of an appeal the appellate court loses all jurisdiction in the case. It stands in the same situation it did before the appeal was prayed.[184] The dismissal of an appeal from a judgment because of a failure to file the transcript within the time prescribed is, in effect, an affirmance of the judgment, if the order of dismissal does not expressly provide that it is made without prejudice to the right of the appellant to take another appeal, and a second appeal from the same judgment will be dismissed.[185] As a general rule, the dismissal of an appeal is practically an affirmance of the judgment appealed from.[186] But there are exceptions to this rule.[187] Dismissal of an appeal because it was prematurely taken is not a bar to a second appeal in the same case when a record is made up from which an appeal can be taken.[188] An order dismissing an appeal may be modified, so as to read "without prejudice," thus permitting the prosecution of a second appeal, notwithstanding the *remittitur* has issued before the modification is made.[189] Under the Colorado practice, when an appeal is dismissed "without prejudice," the appellant's right to a writ of error at any time within three years from the rendition of judgment remains.[190] An appeal from a judgment and from an order overruling a motion for a new trial, made after judgment, on the ground of insufficiency of the evidence to sustain the verdict, will not be dismissed as a double appeal.[191] Under the Washington appeal act of 1893, an appellant has a right to dismiss his appeal with a view to a second appeal, but such dismissal will not be granted him without prejudice, and the supreme court will retain jurisdiction for the pur-

182 Karth v. Light, 15 Cal. 324.

183 Id.

184 Maxwell v. Williams, Hempst. 172, Fed. Cas. No. 9324a. See Cal. Code Civ. Proc., § 955.

185 Garibaldi v. Garr, 97 Cal. 253, 32 Pac. 170; Spinetti v. Brignardello, 54 Cal. 521.

186 Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; State v. Biesman, 12 Mont. 12, 29 Pac. 534; Simpson v. Prather, 5 Or. 86; Beecher v. Lewis, 84 Va. 630, 6 S. E. 367; Manier v. Lindsey, 3 Bush. 94.

187 See State v. McKinnon, 8 Or. 485, Freas v. Engelbrecht, 3 Colo. 377, 383.

188 Estate of Rose, 80 Cal. 166, 22 Pac. 86.

189 Romine v. Cralle, 80 Cal. 626, 22 Pac. 296.

190 McMichael v. Groves, 14 Colo. 540, 23 Pac. 1006.

191 Hawkins v. Hubbard, 2 S. Dak. 631, 51 N. W. 774, distinguishing Hackett v. Gunderson, 1 S. Dak. 479, 47 N. W. 546; Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; Morris v. Niles, 67 Wis. 341, 30 N. W. 353.

pose of affirming the judgment in the respondent's favor, in case the appellant fails to prosecute a second appeal within the time limited by law.[192]

§ 1883. Dismissal—Procedure.—A motion to dismiss an appeal is not a general appearance.[193] The motion must be presented at the earliest reasonable opportunity;[194] and the grounds relied upon for dismissal should be specifically pointed out in the motion.[195] Notice of the motion must be given to the adverse party.[196] The motion cannot be made by one who was not a party to the appellate proceedings.[197] But when the motion to dismiss goes to the want of jurisdiction to entertain the appeal, it is not material that the motion is made by persons not parties to the record. In such case, the court may dismiss of its own motion.[198] And where a respondent dies pending an appeal, a motion by his personal representatives for its dismissal will not be entertained until they have been substituted in the appellate court in his place. A substitution in the lower court is not sufficient.[199] A stipulation made in the appellate court may be considered on a motion to dismiss the appeal, although not embodied in the transcript.[200] When a motion to dismiss an appeal has been denied, a renewal of the motion upon the same grounds, upon the hearing of the appeal upon its merits, without leave granted in the former order, has nothing to commend it to the discretion of the court, and such renewed motion will also be denied.[201]

§ 1884. Reinstatement.—When an appeal has been dismissed, the appellate court may, upon good cause shown, reinstate it upon motion.[202] The rule of practice is for counsel in his place in open

192 Agassiz v. Kelleher, 9 Wash. 656, 38 Pac. 221. See Tinkham v. Kimble, 2 Wash. 682, 28 Pac. 1038.

193 Law v. Nelson, 14 Colo. 409, 24 Pac. 2; Callahan v. Jennings, 16 Colo. 471, 27 Pac. 1055.

194 Coby v. Halthusen, 16 Colo. 10, 26 Pac. 148; Lamet v. Miller, 68 Cal. 521, 9 Pac. 669; Anderson v. Webster, 30 Fla. 220, 11 South. 546.

195 Bilyeu v. Smith, 18 Or. 335, 22 Pac. 1073; Dyer v. Bradley, 88 Cal. 590, 26 Pac. 511.

196 Dick v. Mullins, 128 Ind. 365, 27 N. E. 741; Loucheine v. Strouse, 46 Wis. 487, 50 N. W. 595.

197 Blanc v. Rodgers, 47 Cal. 606.

198 Bullock v. Taylor, 112 Cal. 147, 44 Pac. 457. See In re Castle Dome Mining etc. Co., 79 Cal. 246, 21 Pac. 746.

199 Lyons v. Roach, 72 Cal. 85, 13 Pac. 151.

200 People v. Burns, 78 Cal. 645, 21 Pac. 540. As to identification of papers not in transcript on hearing of motion to dismiss appeal, see Schammel v. Schammel, 70 Cal. 72, 11 Pac. 497.

201 Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. 116.

202 The Palmyra, 12 Wheat. 9, 6

court to state his grounds for reinstatement, or to make an affidavit of the truth of the grounds.[203] But if dismissed for want of jurisdiction as to the amount in controversy, affidavits of its value come too late.[204] If from any excusable cause appellant has been prevented from prosecuting his appeal, and the same has been dismissed, his remedy is by motion to reinstate the case. And if from like cause he has been prevented from making his motion at the same term in which his appeal was dismissed, he may, upon proper showing, and after due notice to the respondent, make the motion at a subsequent term.[205] Such motion must be supported by affidavit that, in the opinion of counsel, there are substantial errors in the record.[206] A case will be reinstated where fraud or imposition has been used in procuring its dismissal.[207]

Where writ of *scire facias* is asserted to have been issued within ten years after cause of action accrued, the supreme court cannot say that petition for revival after such time is an amendment of the writ, or a continuation of the action, neither the writ nor its terms being set out in the record.[208]

§ 1885. What will be reviewed.—In general, all material errors committed by the court below in its orders, rulings, decisions, and judgments will be reviewed in the supreme court on appeal, when the same are properly made to appear by the record; but it is not its duty to survey the entire testimony in order to determine what instructions should have been given.[209] The error should be assigned by the petition in error, as well as by the motion for a new trial.[210] A point, though not raised in appellant's opening brief, but made in response to respondent's argument, will be passed upon.[211]

L. Ed. 534; Bank of United States v. Swan, 3 Pet. 68, 7 L. Ed. 605. As to when motion to reinstate appeal will be denied, see Swope v. Smith, 1 Okla. 283, 33 Pac. 504; State v. Gibbs, 10 Mont. 212, 25 Pac. 289; Clark-Harris Co. v. Douthitt, 5 Wash. 96, 31 Pac. 422; Evans v. Kilby, 81 Ga. 278, 7 S. E. 226; Harman v. Town Council of Lexington, 32 S. C. 583, 10 S. E. 552.

203 Taylor v. State, 82 Ga. 578, 9 S. E. 783.

204 Richmond v. City of Milwaukee, 21 How. 391, 16 L. Ed. 60.

205 Haight v. Gay, 8 Cal. 300, 68 Am. Dec. 323.

206 Hagar v. Mead, 25 Cal. 598; Dorland v. McGlynn, 45 Cal. 18. See, also, Welch v. Kenney, 47 Cal. 414, and Cal. Sup. Ct. rules 3, 4.

207 Rowland v. Kreyenhagen, 24 Cal. 52; Howell v. Van Ness, 31 N. J. L. 444.

208 Noyes v. French, 20 Okla. 515, 94 Pac. 546.

209 Beadle v. Paine, 46 Or. 424, 80 Pac. 903.

210 Southwestern Cottonseed Oil Co. v. Bank, 12 Okla. 168, 70 Pac. 205.

211 Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713.

CHAPTER LXVIII.

ERRORS CONSIDERED ON APPEAL.

§ 1886. Errors in judgment-roll.—The supreme court will take notice of errors appearing in the judgment-roll, even if not named in the specification of errors in the statement;[1] but not minor errors, if on the whole record the decree be right.[2] On an appeal from the judgment, where there is no statement, the appellate court will only consider matters appearing in the judgment-roll;[3] and the only question reviewable is whether the findings support the judgment.[4] Even if an order refusing to set aside a final judgment were appealable, it would have to be affirmed, where the judgment itself is not in the record, and from the transcript it is not made to appear that the order is not improper.[5]

§ 1887. Errors in law.—Errors in law will be reviewed in the appellate court, although a new trial was not asked.[6] If no errors are assigned in the record, the appellate court will only review the judgment-roll.[7] Upon an appeal from an order denying a new trial, errors apparent on the face of the judgment-roll cannot be considered.[8] They may be reviewed on a bill of exceptions.[9] It has been held that the entire absence of a written decision of the judge trying an issue of fact without a jury may be an error reviewable on appeal.[10] But if the appellant relies on the point that the court below erred in failing to find the facts, he must make it appear by the record, by bill of exceptions, or some other

1 Sharp v. Daugney, 33 Cal. 505.

2 Goode v. Smith, 13 Cal. 81; Swartz v. Davis, 9 Idaho, 238, 74 Pac. 800.

3 Harper v. Minor, 27 Cal. 107; O'Donnell v. Glenn, 8 Mont. 248, 19 Pac. 302; Chase v. Evoy, 58 Cal. 348.

4 Ivancovich v. Weilenman, 144 Cal. 757, 78 Pac. 268; Miller & Lux v. Enterprise Canal Co., 145 Cal. 652, 79 Pac. 439.

5 Green v. Thatcher, 31 Colo. 363, 72 Pac. 1078.

6 Brown v. Tolles, 7 Cal. 399; Sanford v. Duluth etc. Elevator Co., 2 N. Dak. 6, 48 N. W. 434.

7 Millard v. Hathaway, 27 Cal. 119, 137.

8 Estate of Westerfield, 96 Cal. 113, 30 Pac. 1104; Simpson v. Ogg, 18 Nev. 28, 1 Pac. 827.

9 McCartney v. Fitz Henry, 16 Cal. 184; Collier v. Corbett, 15 Cal. 183; Walls v. Preston, 25 Cal. 59.

10 Russel v. Armador, 2 Cal. 305; Ragan v. McCoy, 26 Mo. 166; Sutter v. Streit, 21 Mo. 157.

appropriate method, that findings of fact were not waived; otherwise, the intendments will support the judgment.[11] The failure of the judge to specify in his decision the relief granted or the determination of the action is an error reviewable on appeal from the judgment.[12] When a motion is granted in the court below entirely upon alleged errors of law, the supreme court will review the action of the court below as in other cases.[13] Failure to find on a material issue is a decision against law, and may be reviewed on appeal from an order granting or refusing a new trial.[14] On appeal from a final judgment, while the court cannot consider the sufficiency to support the verdict or decision, it can determine the question of law as to whether there is any evidence to support such verdict or decision.[15]

§ 1888. Errors in the rulings on evidence.—The errors in the rulings of the court in the progress of the trial are subject to review, when the exceptions are preserved by bill of exceptions. The appellate court will not consider a ruling upon an objection to evidence in the absence of the evidence.[16] Sufficiency of the evidence to sustain the judgment will not be considered by the court of appeals where the evidence is not abstracted or presented to the court outside of the bill of exceptions.[17] Where the bill of exceptions does not contain the evidence, the court, on appeal, will assume that the findings of the trial court are sustained by the evidence.[18] The supreme court will assume that the findings are

11 Mulcahy v. Glazier, 51 Cal. 626.

12 Chamberlain v. Dempsey, 14 Abb. Pr. 241.

13 O'Brien v. Brady, 23 Cal. 243.

14 Clark v. Hewitt, 136 Cal. 77, 68 Pac. 303.

15 Mahoney v. Dixon, 31 Mont. 107, 77 Pac. 519; Carman v. Montana Cent. Ry. Co., 32 Mont. 137, 79 Pac. 690; Monmouth Pottery Co. v. White, 27 Utah, 236, 75 Pac. 622; Beaudin v. Oregon Short Line Ry. Co., 31 Mont. 238, 78 Pac. 303; Sheldon v. Powell, 31 Mont. 249, 78 Pac. 491.

16 People v. Olsen, 80 Cal. 122, 22 Pac. 125. See Hoagland v. Cole, 18 Colo. 426, 33 Pac. 151; York v. Fortenbury, 15 Colo. 129, 25 Pac. 163; Edwards v. Simms, 8 Ariz. 261, 71 Pac. 902; Cahill v. Baird, 128 Cal. 691, 72 Pac. 342; Callaway v. Wilson, 141 Cal. 421, 74 Pac. 1035; Willey v. Benedict Co., 145 Cal. 601, 79 Pac. 270; Blakely v. Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249; Leggat v. Carrol, 30 Mont. 384, 76 Pac. 805; Thornton-Thomas Merc. Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

17 Gerspach v. Barhyte, 17 Colo. App. 489, 68 Pac. 1057; Deere Plow Co. v. Jones, 68 Kan. 650, 76 Pac. 750; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190; Corbin v. McDermott, 33 Wash. 212, 74 Pac. 361; Barto v. Stanley, 36 Wash. 150, 78 Pac. 791.

18 Clipper Min. Co. v. Eli Min. etc. Co., 29 Colo. 377, 93 Am. St.

supported by the evidence where the bill of exceptions does not purport to set out all the evidence, and there are no specifications of the insufficiency of the evidence to support them.[19] A recital in the record at the close of the evidence to the effect that plaintiff and defendant, having no further evidence, rested, and the case was closed, is insufficient to show that all evidence is contained in the case made.[20] Alleged error in the admission of evidence will not be reviewed on appeal, unless the record shows that the evidence was objected to, and an exception reserved at the trial, notwithstanding the statement on motion for a new trial specifies the admission of the evidence as one of the errors on which the party moving would rely.[21] On an appeal from the judgment, there can be no review of the evidence where the bill of exceptions contains no specifications of the insufficiency of the evidence to justify the findings.[22] A bill of exceptions or statement being the

Rep. 89, 68 Pac. 286, 64 L. R. A. 209; City of Pueblo v. Timbers, 31 Colo. 215, 72 Pac. 1059; Stadil v. Aikins, 65 Kan. 82, 68 Pac. 1088; Benton v. Beakey, 70 Kan. 881, 78 Pac. 410; King v. Pony Gold Min. Co., 28 Mont. 74, 72 Pac. 309; Handley v. Sprinkle, 31 Mont. 57, 77 Pac. 296; Beckner v. Henquenet, 14 Okla. 3, 75 Pac. 1131; Goodale Lumber Co. v. Shaw, 41 Or. 544, 69 Pac. 546; Herring, Hall Marvin Co. v. Smith, 43 Or. 315, 72 Pac. 704, 73 Pac. 340; Salt Lake City v. Salt Lake City Water etc. Co., 25 Utah, 456, 71 Pac. 1069.

19 Miller v. Dailey, 136 Cal. 212, 68 Pac. 1029; Froman v. Wilson, 20 Colo. App. 297, 78 Pac. 615; Pelz v. Wright, 64 Kan. 885, 67 Pac. 449; Power v. Stocking, 26 Mont. 478, 68 Pac. 857; Robertson v. Longley, 28 Mont. 128, 72 Pac. 423; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; Merk v. Bowery, 31 Mont. 298, 78 Pac. 519; Bradford v. Cline, 12 Okla. 339, 72 Pac. 369; Frame v. Ryel, 14 Okla. 536, 79 Pac. 97; Adkins v. City of Monmouth, 41 Or. 266, 68 Pac. 737; Olson v. Oregon Short Line Ry. Co., 24 Utah, 460, 68 Pac. 148.

20 Smith v. Alexander, 67 Kan. 862, 74 Pac. 240; Campbell v. Mechanics' Bank, 66 Kan. 778, 71 Pac. 829; King v. Pony Gold Min. Co., 28 Mont. 74, 72 Pac. 309; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362.

21 Alameda Mecad. Co. v. Williams, 70 Cal. 534, 12 Pac. 530. See, also, Dean v. Parker, 88 Cal. 283, 26 Pac. 91; Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Malone v. Del Norte County, 77 Cal. 217, 19 Pac. 422; Ullman v. McCormick, 12 Colo. 553, 21 Pac. 716; Curr v. Hundley, 3 Colo. App. 54, 31 Pac. 939; Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317; White Pine Co. v. Herrick, 19 Nev. 311, 10 Pac. 215; McCarty v. Hayden, 4 Wash. 537, 30 Pac. 637; Hattersley v. Burrows, 4 Colo. App. 438, 36 Pac. 889; Tucker v. Jones, 8 Mont. 225, 19 Pac. 571; Territory v. Keyes, 5 Dak. 244, 38 N. W. 440; Bowman v. Eppinger, 1 N. Dak. 21, 44 N. W. 1000; Territory v. Bell, 5 Mont. 562, 6 Pac. 60; Rutherford v. Talent, 6 Mont. 132, 9 Pac. 821; Bass v. Buker, 6 Mont. 442, 12 Pac. 922.

22 Fatjo v. Swasey, 111 Cal. 628, 44 Pac. 225; Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001;

statutory record for reviewing evidence, if the parties wish to waive such record, and substitute a stipulation for it, the intention to do so must appear with reasonable certainty.[23] Specifications of the insufficiency of the evidence which are merely brief statements of what the evidence shows are insufficient.[24] If an appeal is taken from the judgment alone, more than sixty days after its rendition, no question as to the sufficiency of the evidence can be considered.[25] Evidence volunteered in the court below, without objection, cannot be objected to on appeal.[26] If there is sufficient evidence in the record to warrant the verdict without that which was admitted over objection, the appellate court is not required to determine whether error intervened in overruling the objection.[27] It is a well-settled general rule, that where the evidence upon a question of fact is conflicting, a finding of the trial court thereon will not be disturbed upon appeal.[28] And this is so although the evidence consists of depositions.[29] But the appellate

Carron v. Wood, 10 Mont. 500, 26 Pac. 388; Beatty v. Murray etc. Min. Co., 15 Mont. 314, 39 Pac. 82.

23 Siebe v. Joshua Hendy Mach. Works, 86 Cal. 390, 25 Pac. 14. See Howard v. Ross, 3 Wash. 292, 28 Pac. 526.

24 Adams v. Helbing, 107 Cal. 298, 40 Pac. 422.

25 Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134; Secord v. Quigley, 106 Cal. 149, 39 Pac. 623; Cal. Code Civ. Proc., § 939, subd. 1.

26 Renton v. Monnier, 77 Cal. 449, 19 Pac. 820. See Zook v. Odle, 3 Colo. App. 87, 32 Pac. 82.

27 Mowat v. Wood, 4 Cal. App. 118, 35 Pac. 58.

28 Priest v. Brown, 100 Cal. 626, 35 Pac. 323. See, in illustration of the rule, the following decisions: Soberanes v. Soberanes, 106 Cal. 1, 39 Pac. 39, 527; Loftus v. Fischer, 113 Cal. 286, 45 Pac. 328; Mahan v. Wood, 105 Cal. 12, 38 Pac. 513; In re Sylvester, 105 Cal. 189, 38 Pac. 648; White v. Beer, 105 Cal. 9, 38 Pac. 513; Turner v. Luning, 105 Cal. 124, 38 Pac. 687; Meyer v. Great Western Ins. Co., 104 Cal. 381, 38 Pac. 82; Knox v. Moses, 104 Cal. 502, 38 Pac. 318; Dobinson v. McDonald, 92 Cal. 33, 27 Pac. 1098; Long v. Saufley, 89 Cal. 437, 26 Pac. 902; Chadbourne v. Davis, 9 Colo. 581, 13 Pac. 721; Miller v. Mickel, 9 Colo. 331, 12 Pac. 240; Riley v. Riley, 14 Colo. 290, 23 Pac. 326; Hallack v. Stockdale, 14 Colo. 198, 23 Pac. 340; Doherty v. Morris, 17 Colo. 105, 28 Pac. 85; Potts v. Magnes, 17 Colo. 364, 30 Pac. 58; Castner v. Richardson, 18 Colo. 496, 33 Pac. 163; Corkins v. Prichard, 3 N. Mex. 184 (278), 3 Pac. 746; Hardwick v. State Ins. Co., 23 Or. 290, 31 Pac. 656; Fischer v. Quigley, 8 Wash. 327, 35 Pac. 1071; West Coast Imp. Co. v. Winsor, 8 Wash. 490, 36 Pac. 441; State v. Manville, 8 Wash. 523, 36 Pac. 470; Seattle Gas etc. Co. v. Seattle, 6 Wash. 101, 32 Pac. 1058; Ketchum v. Davis, 3 Wyo. 164, 13 Pac. 15; Chamberlain v. Woodin, 2 Idaho, 642, 23 Pac. 177; O'Connor v. Langdon, 2 Idaho, 61, 26 Pac. 659; Farr v. Griffith, 9 Utah, 416, 35 Pac. 506; Smyth v. Lawson, 7 Utah, 412, 27 Pac. 4; Phillip Best Brewing Co. v. Pillsbury etc. Elevator Co., 5 Dak. 62, 37 N. W. 763; Brownfield v. Bier, 15 Mont. 403, 39 Pac. 461.

29 Priest v. Brown, 100 Cal. 626, 35 Pac. 323.

court will look more closely into the evidence when it consists entirely of depositions, affidavits, or notes of former testimony;[30] and it was held that the general rule above stated does not apply where the evidence is all documentary.[31] An objection to the admission of a deposition, on the ground that the deponent appears to reside within the jurisdiction of the court, is not available on appeal where the deposition is not made part of the record.[32]

The judgment of the lower court will not be disturbed upon a mere preponderance of the testimony.[33] It is not the business of an appellate court to judge of the *quantum* of proof, or pass upon the weight of evidence.[34] It will not, in a law case, usurp the functions of a jury, or of a judge acting in the capacity of a jury, and reverse the judgment because the weight of testimony seems to be on the other side, or because, in a case of conflict of evidence, the jury believed the testimony of witnesses that the appellate court does not believe.[35] Where there is substantial conflict in the testimony as to disputed facts, the appellate court is authorized to assume as proved the facts found which there is substantial evidence to uphold.[36] The insufficiency of the evidence to justify the findings implied in a judgment where findings are waived cannot be considered upon appeal from the judgment, in the absence of a statement on motion for a new trial, or bill of exceptions containing a statement of the evidence or want of evidence.[37]

§ 1889. From final judgment.—On an appeal from a final judgment, the supreme court may review such intermediate non-appealable orders as involve the merits.[38] It may review an order

30 Reay v. Butler, 95 Cal. 206, 30 Pac. 208.

31 Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863.

32 Ullman v. McCormick, 12 Colo. 553, 21 Pac. 716.

33 Dougan v. Abbott, 7 Wash. 370, 35 Pac. 61.

34 McBee v. Ceasar, 15 Or. 62, 13 Pac. 652; Booth v. Columbia etc. R. R. Co., 6 Wash. 531, 33 Pac. 1075; Boburg v. Prahl, 3 Wyo. 325, 23 Pac. 70; United States v. Trabing, 3 Wyo. 144, 6 Pac. 721.

35 Graves v. L. H. Griffith etc Banking Co., 3 Wash. 742, 29 Pac. 344; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029. See Board of Education v. Martin, 92 Cal. 209, 28 Pac. 799.

36 Adams v. Burbank, 103 Cal. 646, 37 Pac. 640; Gerspach v. Barhyte, 17 Colo. App. 489, 68 Pac. 1057; Deere Plow Co. v. Jones, 68 Kan. 650, 76 Pac. 750; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190; Corbin v. McDermott, 33 Wash. 212, 74 Pac. 361; Barto v. Stanley, 36 Wash. 150, 78 Pac. 791.

37 Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811.

38 Cal. Code Civ. Proc., § 956; Hihn v. Peck, 30 Cal. 280. For the review, in such case, there must be

overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference,[39] or an order denying a motion for a new trial on the grounds that the verdict is excessive.[40] But an order denying a new trial cannot be reviewed on an appeal from a final judgment.[41] If on the rendition of a final judgment the court also grants a perpetual injunction, and an appeal is taken from the whole judgment, the injunction is included in the appeal.[42] An order adding a new party plaintiff may be reviewed on appeal from the judgment,[43] or an order for judgment on demurrer.[44] Objections to the form of the action can only be considered on appeal from the judgment, and not on appeal from an order denying a new trial.[45] An order dismissing an attachment may be reviewed if the appeal is also taken from such order.[46]

§ 1890. Orders.—An enumeration of appealable orders are given in the code.[47] All other orders can be reviewed only on appeal from the judgment, and then only when there has been an exception properly made and preserved in the record. An appeal may, however, be taken at the same time from a final judgment and from an appealable order, but each must distinctly appear in the notice of appeal and the undertaking.

§ 1891. Practice.—A party who appears and contests a motion cannot on appeal object that he had no notice of motion.[48] The objection that the statement and notice do not specify the grounds of motion for new trial should be taken in the court below, and, if overruled, will be reviewed in the supreme court.[49] Where a party moves for a nonsuit upon a specific ground, he cannot on appeal assume a different position;[50] or that the court below refused a nonsuit, because of no demand made before suit, unless

a bill of exceptions. Gilman v. Bootz, 80 Cal. 564, 22 Pac. 255.

39 Cal. Code Civ. Proc., § 956.

40 Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287.

41 Cal. Code Civ. Proc., § 956.

42 McGarrahan v. Maxwell, 28 Cal. 75.

43 Davis v. Mayor of New York, 14 N. Y. 506, 67 Am. Dec. 186.

44 Hollister Bank of Buffalo v. Vail, 15 N. Y. 593; Paddock v. Springfield Fire etc. Ins. Co., 12 N. Y. 591; Ford v. Davis, 3 Abb. Pr. 385.

45 Morse v. Wilson, 138 Cal. 558, 71 Pac. 801.

46 Williams v. Glasgow, 1 Nev. 533.

47 See Cal. Code Civ. Proc., § 939, subd. 3.

48 Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

49 Brady v. O'Brien, 23 Cal. 244.

50 Mateer v. Brown, 1 Cal. 221, 52 Am. Dec. 303.

that ground was taken below;[51] or an objection to an order overruling a motion to set aside the judgment and quash the execution.[52] The failure of a party to object to the rendition of a judgment upon a report is no waiver of his right to have his exceptions to the report reviewed.[53] No objection or exception will be examined, except such as are included in the appellant's statement of points on which he relies.[54]

§ 1892. **Statute of limitations.**—The question of the statute of limitations cannot be raised, even though pleaded, unless raised in some form on the trial below.[55]

§ 1893. **What will not be reviewed.**—The appellate court cannot review any portions of an adjudication not actually appealed from,[56] nor which is not included in the printed case.[57] Nothing can be taken into consideration that does not appear upon the return.[58] As a general rule, an objection which might have been obviated in the court below will not be reviewed on appeal.[59] Errors in favor of an appellant cannot be reviewed.[60]

§ 1894. **Costs.**—An error of court in refusing to allow costs cannot be reviewed on an appeal from an order denying a new trial.[61] An order retaxing costs cannot be reviewed when the

51 Baker v. Joseph, 16 Cal. 173.

52 Smith v. Curtis, 7 Cal. 584.

53 Headley v. Reed, 2 Cal. 322.

54 Moore v. Murdock, 26 Cal. 514.

55 McDonald v. Bear River Co., 13 Cal. 238; Shaver v. Sharp County, 62 Ark. 76, 34 S. W. 261.

56 Robertson v. Bullions, 11 N. Y. 243; Kelsey v. Western, 2 N. Y. 500; Bell v. Holford, 1 Duer, 58.

57 Titus v. Orvis, 16 N. Y. 617; Otis v. Spencer, 16 N. Y. 610.

58 Spence v. Beck, 1 Hilt. 276; Kilpatrick v. Carr, 3 Abb. Pr. 117; Rawson v. Grow, 4 E. D. Smith, 18; Trust v. Delaplaine, 3 E. D. Smith, 219; Prentice v. Zane, 8 How. 470, 12 L. Ed. 1160.

59 Gordon v. Clark, 22 Cal. 533; Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; Stewart v. Smith, 14 Abb. Pr. 75; Fowler v. Clearwater, 35 Barb. 143; Judd v. O'Brien, 21 N. Y. 186; Jobbitt v. Goundry, 29 Barb. 509; New York Cent. Ins. Co. v. National Prot. Ins. Co., 14 N. Y. 85; Barnes v. Perine, 12 N. Y. 18; Van Deusen v. Young, 29 Barb. 9; Bumstead v. Dividend Ins. Co., 12 N. Y. 81; Carter v. Hunt, 40 Barb. 89, 93; Forward v. Harris, 30 Barb. 338; Hunt v. Hoboken Land Co., 1 Hilt. 161; Fenn v. Timpson, 4 E. D. Smith, 276; Barlow v. Scott, 24 N. Y. 40; Greason v. Keteltas, 17 N. Y. 491; Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Sheldon v. Wood, 2 Bosw. 267.

60 Weisser v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Glassner v. Wheaton, 2 E. D. Smith, 352; Beach v. Raymond, 2 E. D. Smith, 496; Rooney v. Second Ave. R. R. Co., 18 N. Y. 368; Robbins v. Codman, 4 E. D. Smith, 315; Fake v. Whipple, 39 Barb. 339; Wellman v. Oregon etc. Ry. Co., 21 Or. 530, 28 Pac. 625.

61 Stevenson v. Smith, 28 Cal. 102,

affidavits supporting and resisting the motion are not in the bill of exceptions.[62] On appeal from a judgment, an error which might occur in sustaining a motion, after the appeal was perfected, to strike out the cost-bill, cannot be reviewed.[63] The allowance of costs in an equity case is matter within the discretion of the court, and without a statement or bill of exceptions that discretion cannot be reviewed on appeal.[64] On appeal from a decree allowing an attorney's fee, the presumption is that the court followed the established rule, and considered the amount and character of the services rendered, the labor, time, and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or value of the property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys, and the results obtained.[65] When error does not affirmatively appear in the taxing of costs, it will be presumed that they were properly taxed.[66]

§ 1895. Evidence.—As a rule, the supreme court acts upon the case precisely as it was presented to the court below, and cannot receive or notice new evidence, but must have all the evidence before it which was before the court below.[67] In New York, it is said to be a well-established rule that permits record evidence, imperfectly proved at the trial, to be exhibited on the argument in the appellate court, since if all that was defective was then supplied, it would be idle to send the cause back for a new trial upon an exception no longer tenable.[68] But the supreme court will not review the facts of the case unless a new trial was asked for in the court below, and this whether the case be in equity or at law.[69] If the case, however, be tried on an agreed statement

87 Am. Dec. 107. See Crane v. Forth, 95 Cal. 88, 30 Pac. 193; Freshour v. Hihn, 99 Cal. 443, 34 Pac. 87.

62 Van Buskirk v. Balch, 19 Colo. App. 292, 74 Pac. 792; In re Pina's Estate, 138 Cal. xix. 71 Pac. 171.

63 Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520.

64 Faulkner v. Hendy, 103 Cal. 15, 36 Pac. 1021.

65 Forrester v. Boston M. Cons. Min. Co., 29 Mont. 397, 74 Pac. 1088, 76 Pac. 211.

66 McCleary v. Willis, 35 Wash. 676, 77 Pac. 1073; City of Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982.

67 Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

68 Jarvis v. Sewell, 40 Barb. 455; citing Burt v. Place, 4 Wend. 591; Ritchie v. Putnam, 13 Wend. 524; Dresser v. Brooks, 3 Barb. 429.

69 Reed v. Bernal, 40 Cal. 630; overruling Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

of facts, which forms part of the judgment-roll, the question may be raised, on an appeal from the judgment, whether the judgment be authorized by the agreed facts.[70] It would seem, however, that under the code the question whether the evidence is sufficient to sustain the findings, in a case tried by the court, may be made, on appeal from the judgment, where the testimony is presented by bill of exceptions.[71] The safer practice is, however, to move for a new trial, as the point has not been directly adjudicated. Where the motion for a new trial does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.[72]

§ 1896. **Excessive verdict.**—On appeal from a judgment for plaintiff in an action for personal injuries, appellant's contention that the verdict is excessive cannot be considered where it is not pointed out wherein it is excessive, and the evidence bearing on the extent and nature of the injuries is not in the record.[73] Where the allowance of an attorney's fee is a part of the judgment, the question of the validity of the allowance may be raised on appeal.[74]

§ 1897. **Facts, questions of.**—In New York, on an appeal to the general term of the supreme court, or of a superior city court, from a final judgment rendered in the same court, the facts as well as the law may be reviewed, where the judgment was rendered upon a trial by the court below without a jury, or by a referee; but when the judgment was rendered upon the verdict of a jury, the appeal is upon questions of law alone.[75] On an appeal from an order granting or refusing a new trial, the facts may be reviewed, except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, an appeal cannot be

70 Reed v. Bernal, 40 Cal. 630. As to the necessity of a motion for a new trial, see, also, Foote v. Richmond, 42 Cal. 439; Rycraft v. Rycraft, 42 Cal. 444; Stockton v. Creanor, 45 Cal. 247; Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802, 53 N. W. 747; Pierce v. Manning, 2 S. Dak. 517, 51 N. W. 332; Kleinschmidt v. Iler, 6 Mont. 122, 9 Pac. 901; Twell v. Twell, 6 Mont. 19, 9 Pac. 537; Alder Gulch etc. Min. Co. v. Hayes, 6 Mont. 31, 9 Pac. 581; Colquhoun v. Wells etc. Co., 21 Nev. 459, 33 Pac. 977; State v. Sadler, 21 Nev. 13, 23 Pac. 799.

71 See Jones v. Shay, 50 Cal. 508; Thompson v. Hancock, 51 Cal. 110; Bonner v. Quackenbush, 51 Cal. 180; Christie v. Christie, 53 Cal. 26.

72 Myers v. Casey, 14 Cal. 542.

73 City of Pueblo v. Timbers, 31 Colo. 215, 72 Pac. 1059.

74 Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914.

75 N. Y. Code Civ. Proc., § 1346.

taken from the order granting or refusing a new trial upon the merits.[76] But an order of the general term granting a new trial upon questions of fact, in a case tried by a jury, is not appealable to the court of appeals.[77] Where a new trial is granted in an action tried by a jury, and the record shows that questions of fact were properly before the general term for decision, and that the order for a new trial may or could have been based thereon, the court of appeals will not review it for the purpose of reversal.[78] In cases tried by the court or referee, the court of appeals will look into the evidence only in exceptional cases, made so by the statute.[79]

§ 1898. Findings of fact.—Alleged errors in findings of fact will not be considered where the findings themselves are immaterial to the decision;[80] neither the opinions of the court nor the evidence form any part of the findings of fact, although incorporated therein.[81] The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the court on its own motion, become established facts in the case, and cannot be questioned in the supreme court for the first time.[82] Where alleged findings of fact on which error was sought to be predicated were mere expressions taken from the trial court's opinion, and not from the findings of fact, which were signed by the judge, on which the judgment was based, such alleged errors will not be reviewed.[83] Failure to find on facts in issue constituting a defense to an action will not justify a reversal, unless it was shown that there was evidence given from which such facts could be found.[84] The findings of fact by the trial court are conclusive on appeal, where the evidence is not in the record.[85] A judgment will not be reversed on the findings alone, unless they show affirmatively that such judgment could not have been properly rendered.[86]

76 N. Y. Code Civ. Proc., § 1347.

77 Wright v. Hunter, 46 N. Y. 409; Downing v. Kelly, 48 N. Y. 433; Sprong v. Boston & A. R. R. Co., 58 N. Y. 56.

78 Downing v. Kelly, 48 N. Y. 433; Wright v. Hunter, 46 N. Y. 409.

79 Field v. Munson, 47 N. Y. 221.

80 Klockenbaum v. Pierson, 22 Cal. 160.

81 James v. Williams, 31 Cal. 211.

82 Duff v. Fisher, 15 Cal. 375.

83 Upton v. Weisling, 8 Ariz. 298, 71 Pac. 917.

84 Callahan v. James, 141 Cal. 291, 74 Pac. 853.

85 Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914.

86 Semple v. Cook, 50 Cal. 26.

§ 1899. Findings, omission of.—The omission of a judge or referee trying a cause to find upon a particular question of fact cannot be reviewed on an appeal from the judgment. The remedy is to have it referred back for correction.[87] Where the court fails to find the facts which the evidence establishes, a motion for a new trial—that is, to set aside and modify the findings—having been made, the supreme court will look into the evidence for such facts, and is not concluded by the findings of the court below.[88] The supreme court is not authorized to presume the finding of a fact not within the issue,[89] nor to look beyond the findings contained in the case in order to draw inferences of fact bearing on the appeal,[90] except for the purpose of giving a construction to an ambiguous finding.[91]

§ 1900. Findings—Review of—Generally.—Failure of the trial court to make findings of fact on material issues will not be considered on appeal unless the lower court was asked to make such findings and refused to do so.[92] The appellate court has no power to make findings from the evidence.[93] The fact that there is no finding upon a material issue raised by the pleadings may be considered on appeal, where one of the grounds given in the notice of motion for new trial is that "the decision is against law."[94] The insufficiency of the findings to support the judgment can be considered only on an appeal from the judgment.[95] Where written findings are necessary, and do not appear in the record, they will be deemed to have been waived, and if they were not, the error, in order to be reviewed, must be shown by a bill of exceptions, statement, or other appropriate mode whereby the record presents the question.[96] The omission of the trial court to find upon an

87 People v. Albright, 14 Abb. Pr. 305; Heroy v. Kerr, 8 Bosw. 194; Platt v. Thorne, 8 Bosw. 574; Sharp v. Wright, 35 Barb. 236; Ingraham v. Gilbert, 20 Barb. 151.

88 Riley v. Heisch, 18 Cal. 198.

89 Bernal v. Gleim, 33 Cal. 668; Gifford v. Carvill, 29 Cal. 589.

90 Stewart v. Smith, 14 Abb. Pr. 75.

91 Spencer v. Ballou, 18 N. Y. 327; Carman v. Pultz, 21 N. Y. 547; Terry v. Wheeler, 25 N. Y. 520.

92 Hicklin v. McClear, 18 Or. 126, 138, 22 Pac. 1057; Noland v. Bull, 24 Or. 479, 33 Pac. 983. Compare Haight v. Tryon, 112 Cal. 4, 44 Pac. 318.

93 Blood v. La Serena etc. Water Co., 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

94 Spotts v. Hanley, 85 Cal. 155, 24 Pac. 738. See Brison v. Brison, 90 Cal. 328, 27 Pac. 186; Adams v. Helbing, 107 Cal. 298, 40 Pac. 422.

95 Kirman v. Hunnewill, 93 Cal. 519, 29 Pac. 124. See Graham v. Stewart, 68 Cal. 374, 9 Pac. 555.

96 Campbell v. Coburn, 77 Cal. 36, 18 Pac. 860. See Carr v. Cronan, 54

issue is not an error for which the judgment will be reversed, where it does not appear that evidence was introduced in relation to such issue.[97] The findings of fact by the trial court are conclusive on appeal, where the evidence is not in the record.[98] So failure to find fully upon a material issue is not a ground for reversal, if a more complete finding upon the issue would necessarily have been adverse to the appellant.[99] If the complaint set forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient to sustain a judgment, and a failure to find upon the other issue does not render the decision against law, and is not ground for a new trial.[100]

When the findings support the judgment, and contain nothing inconsistent with it, the failure to find upon affirmative defenses will not be ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to the issues presented by such defenses.[101] Under Nevada practice, a case will not be reversed for want of a finding, or for a defective finding, unless the finding is excepted to, or a finding is requested upon the omitted point. There is an implied finding in favor of the judgment, of all facts properly pleaded.[102] It is the settled

Cal. 600. As to effect of failure to include findings in the record on appeal, see State v. Rohde, 8 Wash. 362, 36 Pac. 276; Ortega v. Cordero, 88 Cal. 221, 26 Pac. 80; Poujade v. Ryan, 21 Nev. 449, 33 Pac. 659.

97 Rogers v. Duff, 97 Cal. 67, 31 Pac. 836; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Callahan v. James, 141 Cal. 291, 74 Pac. 853.

98 Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914; United States Mortgage etc. Co. v. Marquam, 41 Or. 391, 69 Pac. 37, 41; Upton v. Weisling, 8 Ariz. 298, 71 Pac. 917; First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

99 Gillespie v. Lake, 85 Cal. 402, 24 Pac. 891; Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39.

100 Adams v. Helbing, 107 Cal. 298, 40 Pac. 422; Brison v. Brison, 90 Cal. 328, 27 Pac. 186; Malone v. Del Norte County, 77 Cal. 217, 19 Pac. 422; Dolliver v. Dolliver, 94 Cal. 642, 30 Pac. 4. But see Estill v. Irvine, 10 Mont. 509, 27 Pac. 186. As to defective findings ground for reversal, see Cotter v. Lindgren, 106 Cal. 602, 46 Am. St. Rep. 255, 39 Pac. 950; Russell v. McDowell, 83 Cal. 70, 23 Pac. 183; Estep v. Armstrong, 91 Cal. 659, 27 Pac. 1091; Gould v. Stafford, 77 Cal. 66, 18 Pac. 879; Overacre v. Blake, 82 Cal. 77, 27 Pac. 1091; Smith v. Los Angeles Immigration Assoc., 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677; Hooker v. Thomas, 86 Cal. 176, 24 Pac. 941; Waldror v. Waldron, 85 Cal. 251, 24 Pac. 649, 858, 9 L. R. A. 487; Bateman v. Raymond, 15 Mont. 439, 39 Pac. 520.

101 Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Hawes v. Clarke, 84 Cal. 272, 24 Pac. 116; Witcher v. Conklin, 84 Cal. 499, 24 Pac. 302.

102 Dutertre v. Shallenberger, 21 Nev. 507, 34 Pac. 449. Consult, as to when findings will not be dis-

practice of appellate tribunals not to interfere to set aside the finding of a trial court or jury when the questions determined thereby are purely questions of fact, unless the finding is so manifestly unjust as to carry conviction that it was the result of bias or prejudice.[103] If there is evidence to sustain the findings of the court, they will be taken as conclusive upon appeal.[104] And where the evidence is not before the appellate court the findings of fact are conclusive as to the matters therein stated.[105]

§ 1901. **Instructions.**—The appellate court will not pass upon the completeness of the instructions given by the court to the jury, if the plaintiff is not entitled to recover upon his own showing.[106] Though the instructions may not be technically correct, the supreme court will not interfere if the question upon which the case turns was fairly put before the jury.[107] That the refusal of instructions may be complained of on appeal, the record should

turbed on appeal, Hamar v. Peterson, 9 Wash. 152, 37 Pac. 309; Park County v. Jefferson County, 12 Colo. 585, 21 Pac. 912; Ullman v. McCormick, 12 Colo. 553, 21 Pac. 716; Lovejoy v. Chapman, 23 Or. 571, 32 Pac. 687; Wells v. Wells, 7 Utah, 68, 24 Pac. 752; Baker v. Baker, 2 S. Dak. 261, 39 Am. St. Rep. 776, 49 N. W. 1064; Drown v. Ingels, 3 Wash. 424, 28 Pac. 759; Reynolds v. Dexter, 2 Wash. 185, 26 Pac. 221; Metropolitan Loan Assoc. v. Esche, 75 Cal. 513, 17 Pac. 675; Wood v. Pendola, 78 Cal. 287, 12 Am. St. Rep. 50, 20 Pac. 678. When disregarded on appeal, see Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695. As to conclusiveness of findings in equity cases, see Dooley Block v. Rapid Transit Co., 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; Canal Co. v. Edwards, 9 Utah, 477, 35 Pac. 487; Cummings v. Ross, 90 Cal. 68, 27 Pac. 62. As to findings in support of order refusing injunction, see Hunt v. Steese, 75 Cal. 620, 17 Pac. 920. As to adoption of findings of referee, see Stahn v. Hall, 10 Utah, 400, 37 Pac. 585; Ferry v. King County, 2 Wash. 337, 26 Pac. 537. As to appeal from finding in replevin, see Gramm v. Fisher, 3 Wyo. 595, 29 Pac. 377. As to finding of special damages by jury, see San Gabriel Wine Co. v. Behlow, 94 Cal. 108, 29 Pac. 420. As to error against party not appealing, see McDonald v. Taylor, 89 Cal. 42, 26 Pac. 595. As to review of sufficiency of evidence to sustain finding, see Heilbron v. Kings River Canal Co., 76 Cal. 11, 17 Pac. 933; Parker v. Reay, 76 Cal. 103, 18 Pac. 124; Menk v. Home Ins. Co. 76 Cal. 50, 9 Am. St. Rep. 158, 14 Pac. 837, 18 Pac. 117; Spaulding v. Bradley, 79 Cal. 449, 22 Pac. 47; Pickert v. Rugg, 1 N. Dak. 230, 46 N. W. 446. As to remand to trial court for further testimony see Elliot v. Whitmore, 8 Utah, 253, 30 Pac. 984. When findings must stand as approved by the trial court, see Meadowcraft v. Walsh, 15 Mont. 544, 39 Pac. 914.

103 Pawnee etc. Canal Co. v. Jenkins, 1 Colo. App. 425, 29 Pac. 381.

104 Glassell v. Verdugo, 108 Cal. 503, 41 Pac. 403.

105 Loftus v. Fischer, 106 Cal. 616, 39 Pac. 1064.

106 Enright v. San Francisco etc. R. R. Co., 33 Cal. 230.

107 Smith v. Harper, 5 Cal. 330.

contain the instructions given, to show that the requested instructions were not given in other parts of the charge.[108] In determining whether there is error in the instructions to the jury, the whole charge will be considered together, and the judgment will not be reversed, although it may appear that some one instruction taken by itself may not be entirely correct.[109] The refusal of an instruction cannot be regarded as prejudicial error unless appellant points out the testimony requiring the refused instructions.[110] Error in the giving or refusal of instructions will not be reviewed on appeal where the instructions are not made a part of the judgment-roll or incorporated in a statement or bill of exceptions.[111] Where all the instructions and the evidence are not contained in the record, instructions objected to cannot be reviewed.[112] An appeal founded on the giving of erroneous instructions will not be dismissed for failure to set out the evidence in the bill of exceptions, where the errors assigned could not have been correct under any evidence.[113] And in order to obtain a review of instructions, it must appear from the record that they were objected to in apt time.[114] And the exceptions should be sufficiently specific to call the attention of the court to the alleged errors.[115] A party cannot except to

108 Buelna v. Ryan, 139 Cal. 630, 73 Pac. 466; French v. Guyot, 30 Colo. 222, 70 Pac. 683; Brown v. Gillett, 33 Wash. 264, 74 Pac. 386; Lemman v. City of Spokane, 38 Wash. 98, 80 Pac. 280.

109 Wellman v. Oregon etc. Ry. Co., 21 Or. 530, 28 Pac. 625; McQuowen v. Cavanaugh, 14 Colo. 188, 23 Pac. 341; White v. Territory, 1 Wash. 279, 24 Pac. 447; Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

110 Davis v. Shepherd, 31 Colo. 141, 72 Pac. 57; Merriner v. Jeppson, 19 Colo. App. 218, 74 Pac. 341.

111 Missoula etc. Light Co. v. Morgan, 13 Mont. 394, 34 Pac. 488; Kleinschmidt v. McDermott, 12 Mont. 309, 30 Pac. 393. See, as to the sufficiency of the record for the review of instructions, Rodoni v. Lytle, 13 Mont. 123, 32 Pac. 491; Malone v. Crescent City etc. Transp. Co., 77 Cal. 39, 18 Pac. 858; California etc. Ry. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599; People v. Marseiler, 70 Cal. 98, 11 Pac. 503; Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31; Matthews v. Jones, 92 Cal. 563, 28 Pac. 597; Gum v. Murray, 6 Mont. 10, 9 Pac. 447; Banks v. Hoyt, 11 Colo. 399, 18 Pac. 448; Witcher v. Watkins, 11 Colo. 548, 19 Pac. 540; Fisher v. United States, 1 Okla. 252, 31 Pac. 195; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187. As to striking instructions from record, see Medcalf v. Bush, 4 Wash. 386, 30 Pac. 325.

112 Rice v. Williams, 18 Colo. App. 330, 71 Pac. 433.

113 Downing v. State, 10 Wyo. 373, 69 Pac. 264; Bingham v. Lipman Wolf & Co., 40 Or. 363, 67 Pac. 98; Pryor v. Walkerville, 31 Mont. 618, 79 Pac. 240.

114 Schoolfield v. Houle, 13 Colo. 394, 22 Pac. 781; Dawson v. Coston, 18 Colo. 493, 33 Pac. 189; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413.

115 Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525, 36 Pac. 929;

instructions if given at his own instance.[116] And a judgment will not be reversed for an error in the giving or refusing of instructions, if the losing party could not have been prejudiced thereby.[117]

§ 1902. Irregularities.—If the decision or verdict is regular, mere irregularities on the trial will not be reviewed;[118] nor the entry of judgment in disregard of an order staying proceedings.[119] But where it had been entered in a grossly irregular manner, and the court below refused to correct it, the error would be reviewed.[120] A judgment is not rendered ineffective by reason of being contained in the same document with the findings.[121] If a judgment is just in the main, mere technical irregularities of form will be disregarded.[122]

§ 1903. Matter in discretion of court.—The refusal of a referee to adjourn a hearing, where it was a matter resting in his discretion, will not be reviewed on appeal;[123] nor denial of motion to stay trial till the decision in another cause;[124] nor that a judgment for defendant is improper, the answer containing no prayer for relief.[125] The appellate court will not inquire into the reasons which induce the judge to sign the bill after the statutory period.[126] Nothing but an abuse of discretion on his part, or a

Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837. Compare Cavallaro v. Texas etc. Ry. Co., 110 Cal. 348, 52 Am. St. Rep. 94, 42 Pac. 918; Nickum v. Gaston, 24 Or. 380, 33 Pac. 671, 35 Pac. 31.

116 Sierra Union Water etc. Co. v. Baker, 70 Cal. 572, 8 Pac. 305, 11 Pac. 654.

117 Clark v. Child, 66 Cal. 87, 4 Pac. 1058. As to presumption in support of instructions, see Carpenter v. Ewing, 76 Cal. 487, 18 Pac. 432; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; Klink v. People, 16 Colo. 467, 27 Pac. 1062; Hornbein v. Blanchard, 4 Colo. App. 92, 35 Pac. 187; Fugate v. Smith, 4 Colo. App. 201, 35 Pac. 283. As to mistake in instructions not warranting a new trial, see O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

118 As to form of judgment as entered, see Ingersoll v. Bostwick, 22 N. Y. 425; Johnson v. Carnley, 10 N. Y. 570, 61 Am. Dec. 762; Witherhead v. Allen, 28 Barb. 661; Mayor of New York v. Lyons, 24 How. Pr. 280; Rankin v. Newman, 107 Cal. 602, 40 Pac. 1024.

119 Elwell v. Dodge, 33 Barb. 336.

120 Johnson v. Farrell, 10 Abb. Pr. 384.

121 Hopkins v. Warner, 109 Cal. 133, 41 Pac. 868.

122 People v. McCauley, 1 Cal. 379; Webster v. King, 33 Cal. 348.

123 Carpenter v. Haynes, 1 N. Y. Code Rep. (N. S.) 414.

124 James v. Chalmers, 6 N. Y. 209.

125 Towdy v. Ellis, 22 Cal. 650.

126 People v. Lee, 14 Cal. 510.

great preponderance of evidence against the verdict, will warrant an appellate court in interfering.[127]

§ 1904. Order by consent.—The supreme court will not hear any objections to an order entered by consent of parties.[128] A court of appellate jurisdiction cannot reverse a judgment produced by the voluntary act of a party.[129] And no decision on any point rendered at the suggestion of the appellant can be reviewed.[130] A question which has been excluded from the issues by the act of the appellant cannot be considered on appeal.[131] A judgment entered upon stipulation cannot be reviewed, even though both parties consent.[132]

§ 1905. Questions.—Questions not directly involved, and those unnecessary to a judgment of affirmance or reversal, will not be considered;[133] or questions not presented in good faith; or questions not arising in the due course of litigation.[134] Questions of discretion of the judge cannot be reviewed in the supreme court, except in cases of gross abuse, to the injury of the party;[135] or the refusal of the court or referee to allow a witness to be recalled;[136] or the allowance of a leading question;[137] or granting or refusing leave to amend a pleading.[138]

127 Gove v. Moses, 1 Wash. T. 13; Daws v. Glascow, Burn. (Wis.) 8; Newby v. Territory of Oregon, 1 Or. 163; Tuller v. Arnold, 93 Cal. 166, 28 Pac. 863.

128 Meerholz v. Sessions, 9 Cal. 277.

129 Paul v. Armstrong, 1 Nev. 82.

130 Fairbanks v. Corlies, 3 E. D. Smith, 582, 1 Abb. Pr. 150; Orser v. Grossman, 4 E. D. Smith, 443.

131 Jones v. Morgan, 67 Cal. 308, 7 Pac. 734.

132 Gridley v. Daggett, 6 How. Pr. 280; Townsend v. Masterson Stone Dressing Co., 15 N. Y. 587. So in special cases: McAllister v. Albion Plank Road Co., 10 N. Y. 353, 7 How. Pr. 301; Matter of Canal and Walker Streets, 12 N. Y. 406; New York Cent. R. R. v. Marvin, 11 N. Y. 276.

133 West v. Smith, 5 Cal. 96.

134 People v. Pratt, 30 Cal. 223.

135 Smith v. Billett, 15 Cal. 26; Smith v. Richmond, 15 Cal. 501; O'Brien v. Brady, 23 Cal. 243.

136 Thomas v. Fleury, 26 N. Y. 26; Trimble v. Stilwell, 4 E. D. Smith, 512.

137 Budlong v. Van Nostrand, 24 Barb. 25.

138 United States v. Gurney, 4 Cranch, 337, 2 L. Ed. 638; Marine Ins. Co. v. Young, 5 Cranch, 187, 3 L. Ed. 74; Barr v. Gratz, 4 Wheat. 220, 4 L. Ed. 553; Van Duzer v. Howe, 21 N. Y. 531; Hodges v. Tenn. Ins. Co., 8 N. Y. 416; Hunt v. Hudson River Fire Ins. Co., 2 Duer, 480; Van Ness v. Bush, 14 Abb. Pr. 33; St. John v. Northrup, 23 Barb. 25; Hendricks v. Decker, 35 Barb. 298; Kissam v. Roberts, 6 Bosw. 154; Woodruff v. Hurson, 32 Barb. 557; Robbins v. Richardson, 2 Bosw. 248; Ford v. David, 1 Bosw. 569; Gould v. Rumsey, 21 How. Pr. 97; Wright v. Hollingsworth, 1 Pet. 165, 7 L. Ed. 97; White v. Wright, 22 How. 19, 16 L. Ed. 279; Eberly v. Moore, 24 How. 147, 16 L. Ed. 612.

§ 1906. **Rulings.**—Where a new trial was granted on one of several grounds, the order will not be reversed if it was in the discretion of the court to make it upon any of the grounds stated.[139] But inconsequential rulings and decisions on which error is assigned will not be considered.[140] Complaint cannot be made on appeal that the court made no disposition of a demurrer, the record not showing it was presented to the court.[141] Alleged error in striking out paragraphs from an answer cannot be reviewed where an amended answer, subsequently filed, is not contained in the abstract.[142] Where there was nothing in the record to show that any motion for a continuance was made, heard, or determined by the court, or that the court ever made an order continuing or refusing to continue the cause, an assignment that the court erred in overruling defendant's motion for a continuance could not be reviewed.[143] The ruling of the trial court upon a nonsuit presents a question of law, and, as such, must be both excepted to and specified as an error at law occurring at the trial and excepted to by the appellant.[144] The exception must appear in the stating or substantive part of the bill of exceptions or statement, and it is not enough that it be stated or referred to merely in the assignment of errors relied upon.[145] In reviewing a judgment rendered on motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove.[146]

§ 1907. **Subjects of review on appeal—Miscellaneous.**—The right of appeal is a legislative right, and he who relies upon the right must be able to show some positive authority therefor. Under

139 Oullahan v. Starbuck, 21 Cal. 413.

140 Paige v. O'Neal, 12 Cal. 483; Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644.

141 O'Neil v. McLennan (Cal.), 73 Pac. 576.

142 Rawlings v. Casey, 19 Colo. App. 152, 73 Pac. 1090.

143 Miller v. Matheson, 28 Mont. 132, 72 Pac. 414.

144 Flashner v. Waldron, 86 Cal. 211, 24 Pac. 1063; Alpers v. Hunt, 86 Cal. 78, 21 Am. St. Rep. 17, 24 Pac. 846, 9 L. R. A. 483; Schroeder v. Schmidt, 74 Cal. 459, 16 Pac. 243; Miller v. Wade, 87 Cal. 410, 25 Pac. 487; Gerlach v. Turner, 89 Cal. 446, 26 Pac. 870; Fogel v. Schmalz, 92 Cal. 412, 28 Pac. 444; Toulouse v. Pare, 103 Cal. 251, 37 Pac. 146. See McKay v. Montana Union Ry. Co., 13 Mont. 15, 31 Pac. 999.

145 Craig v. Hesperia etc. Water Co., 107 Cal. 675, 40 Pac. 1057; Braverman v. Fresno etc. Irr. Co., 101 Cal. 644, 36 Pac. 386. See, also, as to review of rulings on motions for nonsuits, Burns v. Commencement etc. Imp. Co., 4 Wash. 558, 30 Pac. 668, 709; DeGraf v. Seattle etc. Nav. Co., 10 Wash. 468, 38 Pac. 1006; Lalande v. McDonald, 2 Idaho, 307, 13 Pac. 347.

146 Creek v. McManus, 13 Mont. 152, 32 Pac. 675.

the Colorado practice, no appeal lies from a judgment of ouster entered by a district court in an action for the usurpation of a public office.[147] Where a petition in intervention is denied, and no exception appears to have been taken by the interveners, the correctness of the ruling is not open to review upon appeal by a defendant in the action.[148] Other and additional assignments of insufficiency of evidence than those specified in motion for nonsuit will not be considered on appeal.[149] An order consolidating actions will not be reviewed on appeal, unless an exception to the order is taken in the court below.[150] Nor can the question whether the trial court erred in striking out parts of an answer be presented upon an appeal from a judgment without a bill of exceptions.[151] But the action of the court on a motion to strike out a counterclaim will be deemed excepted to without a formal bill of exceptions, and will be reviewed on an appeal from the judgment.[152] An order striking out a portion of the complaint, not being itself appealable, may be reviewed on appeal from the final judgment.[153] But an order denying a motion to vacate a judgment cannot be reviewed on appeal from the judgment.[154] A matter of discretion, such as the refusal of the trial court to reopen the case for introduction of evidence, is not reviewable on appeal.[155] Failure of jury to find upon the issue raised by a counterclaim in the defendant's answer, not being prejudicial to any of the plaintiff's rights, will not be reviewed on appeal.[156] Under laws of South Dakota, an order involving the merits of the action is appealable.[157] An appeal from a judgment, where the only error apparent upon the record is manifestly a trivial clerical error in the computation of interest, which would have been corrected by the court below, upon having its attention called to the

147 Londoner v. People, 15 Colo. 246, 25 Pac. 183.

148 Grand Grove etc. v. Garibaldi Grove etc., 105 Cal. 219, 38 Pac. 947. See Henry v. Travelers' Ins. Co., 16 Colo. 179, 26 Pac. 318.

149 Meier v. Northern Pacific Ry. Co., 51 Or. 69, 93 Pac. 691.

150 Bangs v. Dunn, 66 Cal. 72, 4 Pac. 963. See Webb v. Trescony, 76 Cal. 621, 18 Pac. 796.

151 Spence v. Scott, 97 Cal. 181, 31 Pac. 52, 939.

152 Dodson v. Nevitt, 5 Mont. 518, 6 Pac. 358.

153 Swain v. Burnette, 76 Cal. 299, 18 Pac. 394. As to review of order refusing to strike out pleading, see Ganceart v. Henry, 98 Cal. 281, 33 Pac. 92.

154 Jenness v. Bowen, 77 Cal. 310, 19 Pac. 522.

155 Finn v. Oregon Water P. & Ry. Co., 51 Or. 66, 93 Pac. 690; Johnson v. Conner, 48 Wash. 431, 93 Pac. 914.

156 North Star Boot & Shoe Co. v. Stebbins, 2 S. Dak. 74, 48 N. W. 833.

157 See Greeley v. Winson, 2 S. Dak. 361, 50 N. W. 630.

matter, is frivolous. And the lower court will be directed to make the proper correction, and the appellate court will require the costs to be paid by the appellant, and allow the respondent damages for delay as part of the costs of appeal.[158] An appeal from a judgment regularly entered upon a personal contract, upon sufficient evidence to support it, and no evidence in support of the defense relied on, is unavailing.[159] Alleged error in overruling a demurrer to the complaint can be reviewed only on an appeal from the judgment, and not on an appeal from an order denying a new trial.[160] Alleged error in sustaining a demurrer will not be considered upon appeal, where it does not appear from the record upon appeal that such demurrer was interposed or sustained.[161] In every case where it is desired to review a motion on appeal, it should be made part of the record by a bill of exceptions, showing that the motion was made, and the ground upon which it was made. Error in the granting of a motion must be made affirmatively to appear in the record.[162]

§ 1908. **When exception must be taken.**—It is a general rule of practice, that no point arising on the pleadings or evidence which has not been brought to the notice of the inferior courts

158 Rountree v. I. X. L. Lime Co., 106 Cal. 62, 39 Pac. 16; Hopkins v. Kitts, 37 Mont. 26, 94 Pac. 201; Baldwin v. Brown, 48 Wash. 303, 93 Pac. 413.

159 McKenzie v. McMillen, 14 Colo. 50, 22 Pac. 1152.

160 Heilbron v. Centerville etc. Ditch Co., 76 Cal. 8, 17 Pac. 932.

161 Clark v. Taylor, 91 Cal. 552, 27 Pac. 860. See further, as to review of alleged error in sustaining or overruling demurrer, Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131; Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; People v. Central Pacific R. R. Co., 76 Cal. 29, 18 Pac. 90; Bates v. Babcock, 95 Cal. 479, 29 Am. St. Rep. 133, 30 Pac. 605, 16 L. R. A. 745; Powell v. Dayton etc. R. R. Co., 14 Or. 22, 12 Pac. 83; Raymond v. Wimsette, 12 Mont. 551, 33 Am. St. Rep. 604, 31 Pac. 537.

162 Herrlich v. McDonald, 80 Cal. 472, 22 Pac. 299. As to review upon appeal from an order granting or denying a new trial, see Southern Pacific R. R. Co. v. Superior Court, 105 Cal. 84, 38 Pac. 627; Storch v. McCain, 85 Cal. 304, 24 Pac. 639; Price v. Buchanan, 12 Colo. 366, 21 Pac. 144; Gallatin Canal Co. v. Lay, 10 Mont. 528, 26 Pac. 1001; Steuffen v. Jefferis, 9 Mont. 66, 12 Pac. 152; United States v. Trabing, 3 Wyo. 144, 6 Pac. 721; Kearney v. Snodgrass, 12 Or. 311, 7 Pac. 309; Kirk v. Matlock, 12 Or. 319, 7 Pac. 322. Review of verdict by court below. See Bradshaw v. Degenhart, 15 Mont. 267, 48 Am. St. Rep. 677, 39 Pac. 90. As to review of acceptance of juror over a party's objection for cause, see Davidson v. Bordeaux, 15 Mont. 245, 38 Pac. 1075. As to review of action of trial court in directing a verdict, see De Landreeie v. Peck, 1 N. Dak. 422, 48 N. W. 342. As to review of order in special probate proceedings, see In re Ohm, 82

will be reviewed on appeal, and such point or objection must be presented by bill of exceptions or statement; and that the appellate court will examine the case only upon the errors assigned by the appellant, and not look into the exceptions taken by respondent, even if made by stipulation.[163] Only errors committed against the appellant will be examined.[164] But objections which could not possibly have been obviated, though not mentioned before, may be raised at any time.[165] Such objection must go to the substance of the cause of action, and not to its technical form of statement.[166] So in respect to objections to the jurisdiction of the court,[167] or to absence of any cause of action in the complaint;[168] or where the complaint contains such defects as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged;[169] or where a bill in equity shows on its face that plaintiff is not entitled to relief, even though no demurrer be filed;[170] or where objections to evidence, though not made in the court below, could not there under any circumstances be obviated.[171]

In an appellate court only such matters will be examined for error as are complained of, and were brought distinctly before the court below at the time of trial.[172] Matters not appearing in the record cannot be considered on appeal.[172a] And when the record shows no foundation for the errors assigned they will be disre-

Cal. 160, 22 Pac. 927. Appeal from order directing payment of family allowance, as to effect of, see Ruggles v. Superior Court, 103 Cal. 125, 37 Pac. 211.

163 Jackson v. F. R. Water Co., 14 Cal. 18; Paul v. Magee, 18 Cal. 699.

164 Seaward v. Malotte, 15 Cal. 304.

165 Beekman v. Frost, 18 Johns. 544, 9 Am. Dec. 246; Palmer v. Lorillard, 16 Johns. 348; Cole v. Blunt, 2 Bosw. 126; Sanford v. Granger, 12 Barb. 392; Pepper v. Haight, 20 Barb 429.

166 Mott v. Smith, 16 Cal. 533.

167 Id.; Valarino v. Thompson, 7 N. Y. 576; First Nat. Bank v. Carter, 10 Wash. 11, 38 Pac. 877.

168 Cal. Code Civ. Proc., § 434; Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639; Barron v. Frink, 30 Cal. 486; Himmelman v. Danos, 35 Cal. 441; Cole v. Blunt, 2 Bosw. 126; Rayner v. Clark, 7 Barb. 581; Lounsbury v. Purdy, 18 N. Y. 515.

169 Hentsch v. Porter, 10 Cal. 555.

170 White v. Fratt, 13 Cal. 521.

171 Mott v. Smith, 16 Cal. 533.

172 Gaines v. White, 2 S. Dak. 410, 50 N. W. 901; Pierce v. Manning, 2 S. Dak. 517, 51 N. W. 332; Melsheimer v. Hommel, 15 Colo. 475, 24 Pac. 1079; Murdock v. Clarke, 90 Cal. 427, 27 Pac. 275; Wood v. Whitton, 66 Iowa, 295, 19 N. W. 907, 23 Pac. 675; Faust v. Goodnow, 4 Colo. App. 352, 36 Pac. 71; Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. 891; City of Denver v. Soloman, 2 Colo. App. 534, 31 Pac. 507; Owl Cañon Gypsum Co. v. Ferguson, 2 Colo. App. 219, 30 Pac. 255; Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Allen v. King, 4 Colo. App. 319, 35 Pac. 1061.

172a Taber v. Clark, 15 Colo. 434,

garded on appeal.[173] Indefinite exceptions, pointing out no specific defect, will not be considered.[174] An objection to the form of a special verdict, if not taken before the verdict is received and recorded, will not be considered on appeal.[175] An objection that two causes of action were improperly joined comes too late when made for the first time in the appellate court.[176]

Under a statute providing that exceptions to a charge may be taken by a party stating to the court, after the jury has retired, and, if practicable, before verdict is returned, that he excepts to the same, specifying the parts excepted to, exceptions to a charge first taken by filing them three days after the verdict was returned cannot be considered on appeal.[177]

§ 1909. Assignment of errors—Generally.—The party alleging error in the appellate court must be able to establish affirmatively the existence of such error by the record.[178] And where the court is unable to determine from an inspection of the record whether error was committed by the trial court, there is no rule or practice requiring it to look elsewhere for information.[179] Errors not embraced in the assignment of errors will not be considered.[180] Nor will a general and vague assignment of an error be considered. A party complaining of error must specify it with

25 Pac. 181. See Coffin v. Taylor, 16 Or. 375, 18 Pac. 638; Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647; State v. Rohde, 8 Wash. 362, 36 Pac. 276; Fisher v. United States, 1 Okla. 252, 31 Pac. 195; West v. Crawford, 80 Cal. 20, 21 Pac. 1123; Maling v. Crummey, 5 Wash. 222, 31 Pac. 600; Evans v. Jones, 10 Utah, 182, 37 Pac. 262; Kelly v. Murphy, 70 Cal. 560, 12 Pac. 467.

173 Leach v. Lothian, 10 Colo. 439, 15 Pac. 816.

174 Healy v. Seward, 5 Wash. 319, 31 Pac. 875.

175 Alhambra etc. Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

176 Davis v. Johnson, 4 Colo. App. 545, 36 Pac. 887. See Simonton v. Rohm, 14 Colo. 51, 23 Pac. 86.

177 Sterrett v. Northport Min. etc. Co., 30 Wash. 164, 70 Pac. 266.

178 Kent v. Dakota etc. Ins. Co., 2 S. Dak. 300, 50 N. W. 85; Houghton v. Clarke, 80 Cal. 417, 22 Pac. 288; Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Campbell v. Walls, 77 Cal. 250, 19 Pac. 427; Tucker v. Salem Flouring Mills Co., 13 Or. 28, 7 Pac. 53; Danvers v. Durkin, 14 Or. 37, 12 Pac. 60; People v. Gillis, 97 Cal. 542, 32 Pac. 586; In re Weringer, 100 Cal. 345, 34 Pac. 825.

179 Denver Machinery Co. v. Merchants' Pub. Co., 4 Colo. App. 146, 35 Pac. 192; Hadra v. Utah Nat. Bank, 9 Utah, 412, 35 Pac. 508. See Wheelock v. Godfrey, 100 Cal. 578, 35 Pac. 317; Estate of Smiley, 4 Colo. App. 582, 36 Pac. 894; Brahoney v. Denver etc. R. R. Co., 14 Colo. 27, 23 Pac. 172.

180 Boynton v. Longley, 19 Nev. 69, 3 Am. St. Rep. 781, 6 Pac. 437; Cunningham v. Seattle etc. Ry. Co., 3 Wash. 471, 28 Pac. 745. See cases cited in notes to preceding section.

precision.[181] He must put his finger on the error complained of.[182] A question not raised in the brief of appellant is deemed waived or abandoned.[183] Under Oregon practice, no objection to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal unless there was an objection, a ruling thereon, and an exception, all properly incorporated into a bill of exceptions.[184] An appellant cannot assail for the first time in the appellate court errors which it was his right to have had corrected in the court below.[185] Thus a party cannot allow evidence to be introduced at the trial without objection, and afterwards, upon an appeal, make an objection which might have been obviated if he had made it when the evidence was offered.[186]

181 State v. Chapman, 1 S. Dak. 414, 47 N. W. 411, 10 L. R. A. 432; State v. Leehman, 2 S. Dak. 171, 49 N. W. 3; Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6.

182 Swift v. Mulkey, 17 Or. 532, 21 Pac. 871; Woodruff v. County of Douglas, 17 Or. 314, 21 Pac. 49.

183 Riordan v. Horton, 16 Wyo. 363, 94 Pac. 448; Bales v. Cannon, 42 Colo. 275, 94 Pac. 21; Petterson v. Stockton & T. C. R. Co., 134 Cal. 244, 66 Pac. 304; French v. Guyot, 30 Colo. 222, 70 Pac. 683; City of Pueblo v. Timbers, 31 Colo. 215, 72 Pac. 1059; City of Denver v. Strobridge, 19 Colo. App. 435, 75 Pac. 1076; Robertson v. Longley, 28 Mont. 128, 72 Pac. 423; York v. Nash, 42 Or. 321, 71 Pac. 59; Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113.

184 State v. Abrams, 11 Or. 172, 8 Pac. 327; State v. Foot You, 24 Or. 61, 32 Pac. 1031, 33 Pac. 537.

185 Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; and cases cited in notes to preceding section.

186 Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606; Reese v. Kinkead, 20 Nev. 65, 14 Pac. 871. See, in further illustration of the rule, the cases following: People v. Reis, 76 Cal. 269, 18 Pac. 309; In re Robinson, 106 Cal. 493, 39 Pac. 862; Bast v. Hysom, 6 Wash. 170, 32 Pac. 997; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Washington Iron Works v. Jensen, 3 Wash. 584, 28 Pac. 1019; Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722, 29 Pac. 451; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Main v. Johnson, 7 Wash. 321, 35 Pac. 67; Earles v. Bigelow, 7 Wash. 581, 35 Pac. 390; Patchen v. Parke etc. Mach. Co., 6 Wash. 486, 33 Pac. 976; Sweeney v. Pacific etc. Elevator Co., 14 Wash. 562, 45 Pac. 151; Miller v. Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; Kutcher v. Love, 19 Colo. 542, 36 Pac. 152; Town of Salida v. McKinna, 16 Colo. 523, 27 Pac. 810; Bourke v. Van Keuren, 20 Colo. 95, 36 Pac. 882; Layton v. Kirkendall, 20 Colo. 236, 38 Pac. 55; Metzler v. James, 12 Colo. 322, 19 Pac. 885; Ayres v. Shields, 14 Colo. 475, 24 Pac. 194; Roy v. Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996; Redman v. Union Pacific Ry. Co., 3 Wyo. 678, 29 Pac. 88; Heilner v. Brown, 2 Idaho, 263, 12 Pac. 903; Darby v. Heagerty, 2 Idaho, 282, 13 Pac. 85; Parke v. Wardner, 2 Idaho, 285, 13 Pac. 172; People v. Peacock, 5 Utah, 237, 14 Pac. 332; Sweeney v. Great Falls etc. Ry. Co., 11 Mont. 523, 29 Pac. 15; Brand v. Servoss, 11 Mont. 86, 27 Pac. 407; Hall v. Harris, 2 S. Dak. 331, 50 N. W. 98; affirming, 1 S. Dak. 279, 36 Am. St. Rep. 730, 46 N. W. 931; Little v. Little, 2 N.

§ 1910. Waiver of objections—Miscellaneous.—Error arising upon a ruling of the court in regard to the right of argument cannot be urged on appeal after waiver at the trial.[187] Matters occurring at the trial, and proper causes for motion for new trial, will be deemed waived, unless presented by motion for new trial.[188] When opposing counsel refrains from objecting at the time to improper argument, and the trial court afterwards refuses relief, reviewing tribunals, invoking a rule analogous to that of estoppel, frequently decline also to interfere.[189] An objection that the court had no jurisdiction to settle a bill of exceptions is waived by a party who is present and participates in the settlement without urging the objection.[190] Where there is no oral argument, and the brief simply refers to the folio of the record where the exceptions are to be found, but contains no argument in relation thereto, they will be held to be waived.[191] An objection by a respondent to the jurisdiction of the supreme court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served, will not be considered by the court, where the objection was not taken and notified to the appellant in writing ten days before the hearing, as provided for by the supreme court rules.[192] If the record on appeal does not show that findings were not made, a waiver will be presumed in support of the judgment.[193] When a motion for nonsuit is made by the defendant at the close of the plaintiff's testimony because of its insufficiency, and overruled, if the defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.[194] Where the defendants, in the trial court, question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and the ruling is not saved by bill of ex-

Dak. 175, 49 N. W. 736; Crabtree v. Segrist, 3 N. Mex. 278 (495), 6 Pac. 202; Williams v. Thomas, 3 N. Mex. 324 (550), 9 Pac. 356. That an exception taken below is not necessary to the review of a judgment on the pleadings, see Johnson v. Manning, 3 Idaho, 352, 29 Pac. 101.

187 State v. Ackles, 8 Wash. 462, 36 Pac. 597.

188 Glaser v. Glaser, 13 Okla. 389, 74 Pac. 944.

189 Cook v. Doud, 14 Colo. 483, 23 Pac. 906.

190 Walsh v. Mueller, 14 Mont. 76, 35 Pac. 226; Coquard v. Weinstein, 15 Mont. 554, 39 Pac. 849. See Stufflebeam v. Montgomery, 3 Idaho, 20, 26 Pac. 125.

191 Neylan v. Green, 82 Cal. 128, 23 Pac. 42.

192 De Pedrorena v. Hotchkiss, 95 Cal. 636, 30 Pac. 787.

193 Goyhinech v. Goyhinech, 80 Cal. 409, 410, 22 Pac. 175.

194 Chamberlain v. Woodin, 2 Idaho, 642, 23 Pac. 177.

ceptions, another demurrer raising the same question cannot be interposed on appeal.[195] Objection to a juror on the ground of alienage may be waived, either expressly or by failure to object at the proper time.[196]

§ 1911. Evidence.—Objections to evidence must be entered of record below;[197] or objections that there was no proof of the absence of witnesses whose depositions were read.[198] An objection that remarks of the court on the exclusion of evidence were objectionable cannot be reviewed on appeal in the absence of an exception thereto taken at the trial.[199] Where a material fact was assumed in the court below, without any objection of the want of evidence thereof, such objection cannot be raised upon appeal.[200] Exceptions to the admissibility of a deed in evidence must be taken advantage of at *nisi prius*.[201] Where parol testimony to vary the terms of a written agreement is offered, and received without objection, the objection that it was inadmissible cannot be raised in the supreme court.[202] If incompetent evidence is admitted and treated as competent, the question of its competency cannot be raised in the appellate court.[203] Where the objection to the admission of testimony on the trial is general, it cannot be made special for the first time in the supreme court.[204]

§ 1912. Findings.—The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, cannot be reviewed.[205] The failure of appellant to except to the findings and conclusions on which judgment is

195 Guthrie v. Fisher, 2 Idaho, 111, 6 Pac. 111; Guthrie v. Phelan, 2 Idaho, 95, 6 Pac. 107.

196 Territory v. Hart, 7 Mont. 489, 17 Pac. 718.

197 Potter v. Carney, 8 Cal. 574; Mott v. Smith, 16 Cal. 535; Payne v. Treadwell, 16 Cal. 247; Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299, 7 L. Ed. 152.

198 Lockhart v. Mackie, 2 Nev. 294.

199 Halverson v. Seattle E. Co., 35 Wash. 600, 77 Pac. 1058.

200 Jencks v. Smith, 1 N. Y. 90; Paige v. Fazackerly, 36 Barb. 392; Munson v. Hegeman, 10 Barb. 112; Willard v. Bridge, 4 Barb. 361; Hunter v. Sandy Hill, 6 Hill, 410; Thurman v. Cameron, 24 Wend. 87; Oakley v. Van Horne, 21 Wend. 305; Ford v. Monroe, 20 Wend. 211; Beekman v. Bond, 19 Wend. 444; Patterson v. Westervelt, 17 Wend. 545; Jackson v. Roberts, 11 Wend. 422; Burnett v. Lyford, 93 Cal. 117, 28 Pac. 855. See preceding section.

201 Posten v. Rassette, 5 Cal. 467.

202 Tebbs v. Weatherwax, 23 Cal. 58.

203 Curiac v. Packard, 29 Cal. 194.

204 People v. Glenn, 10 Cal. 32.

205 Duff v. Fisher, 15 Cal. 375; Santa Rita Land etc. Co. v. Mercer, 3 Ariz. 181, 73 Pac. 398; Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805; Cedar Canyon Cons. Min. Co.

rendered does not preclude an appeal raising the question of error in overruling a demurrer to the complaint and in sustaining a demurrer to the answer.[206] In the absence of an exception to the findings of fact and conclusions of law, an objection that such findings and conclusions were not supported by the facts is unavailable on appeal.[207] So with objections to a master's report;[208] or to the report of commissioners appointed to ascertain an amount due.[209] If the court in its finding of fact fails to find an issue made in the pleadings, the defect must be excepted to in the court below;[210] so of the omission to find upon a particular question of fact.[211] The only question that can be raised in the supreme court upon the findings, if no exception is taken to them, is, Are they consistent with the judgment?[212]

§ 1913. **Instructions.**—Where instructions to the jury are not excepted to at the time they are given or refused, they cannot be considered on appeal.[213] So as to the objection that the court directed the jury to find specially as to a particular fact.[214]

§ 1914. **Irregularity in proceedings.**—An erroneous ruling not excepted to below cannot be complained of on a writ of error.[215] Errors which are not jurisdictional are not to be considered on appeal, unless exceptions are saved.[216] The objection that the

v. Yarwood, 27 Wash. 271, 91 Am. St. Rep. 841, 67 Pac. 749; Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546.

206 Hathaway v. McDonald, 27 Wash. 659, 91 Am. St. Rep. 889, 68 Pac. 376.

207 Wagner v. Mahrt, 32 Wash. 542, 73 Pac. 675.

208 Hudgins v. Kemp, 20 How. 45, 54, 15 L. Ed. 853, 856; Kinsman v. Parkhurst, 18 How. 289, 15 L. Ed. 385.

209 The Virgin, 8 Pet. 538, 8 L. Ed. 655.

210 Merrill v. Chapman, 34 Cal. 251.

211 Sharp v. Wright, 35 Barb. 236; Ingraham v. Gilbert, 20 Barb. 151; People v. Albright, 14 Abb. Pr. 305, 23 How. Pr. 306; Heroy v. Kerr, 8 Bosw. 194, 21 How. Pr. 409; Hulce v. Sherman, 13 How. Pr. 411; Platt v. Thorne, 8 Bosw. 574.

212 James v. Williams, 31 Cal. 211; Lucas v. San Francisco, 28 Cal. 591; Atchison etc. Ry. Co. v. Scaggs, 64 Kan. 561, 67 Pac. 1103; Callahan v. James, 141 Cal. 291, 74 Pac. 853; Upton v. Weisling, 8 Ariz. 298, 71 Pac. 917; United States Mortgage etc. Co. v. Marquam, 41 Or. 391, 69 Pac. 37; Spencer v. Commercial Co., 36 Wash. 374, 78 Pac. 914; First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

213 Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33; Collier v. Corbett, 15 Cal. 186; Payne v. Treadwell, 16 Cal. 247; Letter v. Putney, 7 Cal. 423; St. John v. Kidd, 26 Cal. 263.

214 People v. Chu Quong, 15 Cal. 332.

215 Citizens' Nat. Bank v. Carey Val. Bank, 63 Kan. 889, 66 Pac. 1004.

216 Brown v. Lockhart, 12 N. Mex. 10, 71 Pac. 1086.

jury in the court below was not duly selected and summoned as required by law must be excepted to in the court below.[217] As to the improper allowance of interest on a running account, no objection being taken for that reason to the judgment or finding of the referee, the judgment will not be reversed.[218] Where no exceptions were taken to the reading of the statute law and decisions of the supreme court to the jury, there is no ground of error;[219] or to the reading of a portion of answer which had been stricken out;[220] or that an account presented to the supervisors of a county was not authenticated, as required by statute, cannot be taken in the supreme court for the first time.[221]

§ 1915. **Parties.**—To be reviewable, objection must be taken to parties or the joinder of parties in the court below;[222] or that certain parties could not intervene.[223]

§ 1916. **Pleadings.**—Exceptions must be taken in the court below to objections to the form of a complaint or answer;[224] or that a supplemental complaint should have been filed;[225] or that two counts in a complaint on an equitable action should not be tried by a jury;[226] or an objection to the complaint which defeats only plaintiff's present right to recover;[227] or that the complaint is defective, because it is not alleged that plaintiff's claim was presented to the administrator for allowance.[228] In an appeal from an order denying a new trial, review cannot be had on the grounds of a defective complaint, or insufficient findings.[229] If the plaintiff, on the trial, treats an allegation of the complaint as denied in the answer, he cannot raise the point in the supreme court for the first time that such allegation is not denied.[230] So

217 Spencer v. Doane, 23 Cal. 419.
218 Whiting v. Clark, 17 Cal. 407.
219 People v. Galvin, 9 Cal. 115.
220 Morgan v. Hugg, 5 Cal. 409.
221 Randall v. Yuba Co., 14 Cal. 219.
222 Sands v. Pfeiffer, 10 Cal. 258; The Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609; Livingston v. Woodworth, 15 How. 546, 14 L. Ed. 809.
223 McKenty v. Gladwin, 10 Cal. 227.
224 Sutter v. Cox, 6 Cal. 415; People v. Jones, 20 Cal. 50; Peterson v. Hornblower, 33 Cal. 266; King v. Davis, 34 Cal. 100; Kuhland v. Sedgwick, 17 Cal. 123.
225 Van Maren v. Johnson, 15 Cal. 308.
226 Baker v. Joseph, 16 Cal. 173.
227 Hentsch v. Porter, 10 Cal. 555.
228 Peterson v. Hornblower, 33 Cal. 266.
229 Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134.
230 Racouillat v. Rene, 32 Cal. 450.

in matters of defense not brought forward at the trial.[231] Any error in sustaining a demurrer to an affirmative defense is harmless, if the same evidence can be introduced under the general denial.[232]

231 Bell v. Bruen, 1 How. 169, 11 L. Ed. 89; Findlay v. Hinde, 1 Pet. 241, 7 L. Ed. 128.

232 Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

CHAPTER LXIX.

PRINCIPLES OF DETERMINATION.

§ 1917. In general.—The question before an appellate court is, Was the judgment correct?—not the ground on which the judgment professed to proceed.[1] So where an order granting a new trial can be sustained upon any ground, it will be affirmed notwithstanding such ground was not stated.[2] The supreme court may direct the court below to render the proper judgment.[3] And the court below has no authority to enter a different judgment from that directed.[4] It cannot revise its own judgments; but when proceedings founded on them are brought up for review, it will make such orders as are necessary to cause the judgment to be enforced.[5] An erroneous judgment cannot be corrected by bringing suit in the nature of a bill of review; the proper method is by appeal.[6] The practice of giving the reason in writing for judgment is of modern origin. It is discretionary with the court whether it give an opinion upon pronouncing judgment, and, if given, whether it be oral or in writing.[7] Existing laws at the time the proceedings were had govern the decision on appeal.[8] And the appellate court is bound to decide according to the law of the whole case, and not upon particular points raised by counsel.[9] In chancery cases, the supreme court has full power and jurisdiction, for the purposes of equity, to correct errors of the court below, in whatever shape or by whatever party appeal is taken up.[10]

Errors which the court below can and will correct on motion should not be made the ground of an appeal;[11] such as clerical

1 Davis v. Packard, 6 Pet. 41, 8 L. Ed. 312.

2 Dundon v. McDonald, 137 Cal. 1, 69 Pac. 498; Schnittiger v. Rose, 139 Cal. 656, 73 Pac. 449.

3 Love v. Shartzer, 31 Cal. 487.

4 Argenti v. Sawyer, 32 Cal. 414; Meyer v. Kohn, 33 Cal. 484.

5 Argenti v. San Francisco, 30 Cal. 458.

6 Savings and Loan Soc. v. Thompson, 34 Cal. 76.

7 Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

8 Hancock v. Thom, 46 Cal. 643; United States v. The Peggy, 1 Cranch, 103, 2 L. Ed. 49; Hartung v. People, 22 N. Y. 95.

9 Hubbard v. Sullivan, 18 Cal. 508.

10 Grayson v. Guild, 4 Cal. 122.

11 Bunbury v. Bolton, 1 Bro. P. C. 434.

and arithmetical errors,[12] or errors which might have been cured by amendment, or questions as to variance or regularity.[13] The general rule is, that if error intervenes the judgment must be reversed, and error imports injury to the party against whom it is committed, unless it affirmatively appear that no injury did or could occur to him thereby.[14] But if during subsequent proceedings the foundation of the error is overthrown, and facts are shown to support the rulings of the court, the error is cured;[15] or where error in course of the trial was fully corrected. or the exception waived.[16] When a finding is sought to be impeached, the appellate court will look into the evidence for the purpose of supporting it;[17] but it is not the duty of the court to survey the entire testimony for that purpose.[18] All the findings in an action must be construed together;[19] and a finding of fact may be construed by a finding of law.[20] The appellate court must look into the record to see if there is any foundation for a judgment appealed from.[21] But where appellant presents no argument or authorities in support of an alleged error, the appellate court will not consider the assignment of error, unless the error is so unmistakable that it reveals itself by a casual inspection of the record.[22] An appeal being dismissed, but a new trial granted on appeal from the order denying the same, the judgment is thereby vacated.[23]

§ 1918. Change in law—Pending appeal.—If a statute, requiring mining corporations to post monthly accounts is penal in nature, and is repealed pending an appeal from judgment under the law of such statute, the supreme court has no power to affirm

12 Rogers v. Hosack, 18 Wend. 319.

13 New York Central Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Bate v. Graham, 11 N. Y. 237; Lounsbury v. Purdy, 18 N. Y. 515; Ingersoll v. Bostwick, 22 N. Y. 425; Bennett v. Judson, 21 N. Y. 238; Cardell v. McNiel, 21 N. Y. 341; Lake Ontario R. R. v. Marvine, 18 N. Y. 585; McCormick v. Pickering, 4 N. Y. 276.

14 Rice v. Heath, 39 Cal. 609; Sweeney v. Reilly, 42 Cal. 402.

15 People v. Anderson, 26 Cal. 130.

16 Schenectady etc. R. R. Co. v. Thatcher, 11 N. Y. 102; Kent v. Harcourt, 33 Barb. 491; Miller v. Eagle Life etc. Ins. Co., 2 E. D. Smith, 284; Colvin v. Burnet, 2 Hill, 620; Hearsey v. Pruyn, 7 Johns. 179; Oakes v. Thornton, 28 N. H. 44.

17 Spencer v. Ballou, 18 N. Y. 327. But see Cady v. Allen, 18 N. Y. 573; Stewart v. Smith, 14 Abb. Pr. 75.

18 Southwestern etc. Co. v. Bank, 12 Okla. 168, 70 Pac. 205.

19 Polack v. McGrath, 38 Cal. 666.

20 Smith v. Devlin, 23 N. Y. 363.

21 Howard v. Richards, 2 Nev. 128, 90 Am. Dec. 520.

22 Allison v. Hagan, 12 Nev. 38.

23 Bell v. Staacke, 151 Cal. 544, 91 Pac. 322.

the judgment.[23a] Where the defendant in ejectment was, under the law, entitled at the time of the trial to payment for his improvements, but could not recover because of the unconstitutionality of the act of 1893, the case will be remanded, with directions to proceed under the law as amended in 1901.[24] The lower courts, upon the second trial, should give effect to a statute making certain evidence inadmissible, when such statute is passed prior to the hearing of the second trial.[25]

§ 1919. Harmless errors in evidence.—Where this court sees clearly and beyond doubt that the admission or rejection of improper evidence could in no way materially affect the result, the judgment, on that ground, will not be disturbed;[26] or where it could have no effect on the verdict;[27] or when it is plain that the result must have been the same without such evidence;[28] or where defendant had suffered no injury thereby;[29] or where the findings show that the evidence improperly admitted was disregarded;[30] or if the party would not have been entitled to recover if the excluded testimony had been admitted;[31] or where there was sufficient uncontradicted evidence to warrant the verdict;[32] or where the same facts were afterwards proved by competent evidence;[33] or where admitted by the pleadings.[34] So the improper exclusion of evidence upon a question finally decided in favor of appellant will not be a ground for reversing the judgment;[35] or the

23a Ball v. Tolman, 135 Cal. 375, 87 Am. St. Rep. 110, 67 Pac. 339.

24 Uhl v. Grissom, 12 Okla. 322, 72 Pac. 372.

25 Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632.

26 Persse v. Cole, 1 Cal. 369; Mills v. Barney, 22 Cal. 240; Kidd v. Teeple, 22 Cal. 255; Henry v. Evarts, 30 Cal. 425; Hastings v. Jackson, 46 Cal. 234; Lowery v. Steward, 3 Bosw. 505; Boyd v. Foot, 5 Bosw. 110; Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 Pac. 827.

27 Young v. Emerson, 18 Cal. 416.

28 Belmont v. Coleman, 1 Bosw. 188; Rio Grande Western v. Utah etc. Co., 25 Utah, 187, 70 Pac. 859.

29 Hicks v. Whiteside, 23 Cal. 404; Paige v. O'Neal, 12 Cal. 483; Hoag v. Pierce, 28 Cal. 187; Tyler v. Green, 28 Cal. 406, 87 Am. Dec. 130; Boyce v. Cal. Stage Co., 25 Cal. 460; Norwood v. Kenfield, 30 Cal. 393; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181.

30 Bee v. San Francisco etc. R. R. Co., 46 Cal. 249; Baumgardner v. Willett, 63 Kan. 889, 66 Pac. 1001.

31 Merle v. Mathews, 26 Cal. 455.

32 Zeigler v. Wells, Fargo & Co., 28 Cal. 263.

33 Schenck v. Dart, 22 N. Y. 420; Copper Belle Min. Co. v. Costello (Ariz.), 95 Pac. 94; Zihn v. Zihn, 153 Cal. 405, 95 Pac. 868.

34 Castree v. Gavelle, 4 E. D. Smith, 425.

35 Beekman v. Platner, 15 Barb. 550. See Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34; Cowan v. Cowan, 16 Colo. 335, 26 Pac. 934; Winter v. Fulstone, 20 Nev. 260, 21 Pac. 201, 687; Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154, 159.

exclusion of a question which had been already answered in substance by the witness;[36] or permitting a witness to be questioned as to his opinion, provided the answer only stated facts;[37] or forbidding a witness to testify from a written paper, if he did not subsequently give any testimony.[38] So the refusal to permit an answer to a proper question becomes immaterial by the introduction of the same matter under a subsequent interrogatory;[39] or the improper exclusion of a witness, if the fact proposed to be proved by him could not have affected the result.[40] So, also, the error of allowing a witness to refresh his memory as to an account by reference to memoranda copied from the books is cured by the subsequent introduction of the books.[41]

In Oregon, in equity cases, excluded testimony may be put in the record, the cost thereof to be borne by the one in error; and if no proof in rebuttal is offered, and the higher court decides the testimony is proper evidence, then the cause must be remanded for further proceedings.[42]

§ 1920. **Error in law.**—A new trial will not be granted on account of the erroneous rejection of certain evidence, if evidence was subsequently given without contradiction which entitled the adverse party to recover;[43] submission of a question to the jury, proper for the court, where the decision by the court must have been the same;[44] error in instructions on a point entirely immaterial to the case,[45] or which could not possibly have misled the jury;[46] or where an instruction was defective by reason of an omission, but the omission was supplied in another instruction given.[47]

§ 1921. **Error in pleadings.**—If the court refuses to allow defendant to amend his answer, but no injury results from the refusal, the judgment will not be reversed on this ground;[48] nor

36 Park Bank v. Tilton, 15 Abb. Pr. 384.

37 Dolittle v. Eddy, 7 Barb. 74.

38 Howland v. Willetts, 9 N. Y. 170.

39 Real Del Monte G. & S. M. Co. v. Thompson, 22 Cal. 542.

40 City Bank of Brooklyn v. Dearborn, 20 N. Y. 244.

41 Haines v. Cadwell, 40 Or. 229, 66 Pac. 910.

42 Sutherlin v. Bloomer, 50 Or. 398, 93 Pac. 135.

43 Gildersleeve v. Mahoney, 5 Duer, 383; Field v. Tanner, 32 Colo. 278, 75 Pac. 916.

44 Miller v. Eagle Life etc. Ins. Co., 2 E. D. Smith, 269.

45 Willoughby v. Comstock, 3 Hill, 389; Hayden v. Palmer, 2 Hill, 205.

46 Johnson v. Hudson River R. R. Co., 20 N. Y. 74, 75 Am. Dec. 375.

47 Livermore v. Stine, 43 Cal. 274.

48 Jones v. Block, 30 Cal. 227; Blankenship v. Whaley, 142 Cal. 566,

for defects in the complaint, where it can be gathered therefrom as a whole that the plaintiff had a cause of action upon which he was entitled to judgment, however defectively the cause of action may have been stated.[49] Rulings as to the sufficiency of a complaint are immaterial after the amendment of such complaint.[50] So, also, where no judgment is recovered for any of the injuries of the plaintiff not sufficiently alleged, the defendant is not prejudiced by a refusal to require the plaintiff to make his complaint more definite.[51] It is immaterial that a cross-complaint is stricken on a motion when the proper attack is by demurrer.[52]

§ 1922. Harmless errors, in general.—A judgment will not be reversed for error that can in no respect injure the appellant,[53] unless it affirmatively appear that injustice has been done;[54] or for errors not affecting substantial rights;[55] or for errors of the court which do not materially affect the merits of the case;[56] or when appellant has no interest in the subject-matter;[57] or for errors which affect only the rights of parties who have not appealed.[58] A party is not injured by an error if the error does not prevent him from making out his case.[59]

§ 1923. The same—Continued.—Generally speaking, the burden is on the party alleging error to show that the error claimed operated to his prejudice.[60] When it appears that the error complained of was not prejudicial, it will not be considered.[61] A

76 Pac. 235; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733.

49 Hallock v. Jaudin, 34 Cal. 167; Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447; Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600.

50 Swanston v. Clark, 153 Cal. 300, 95 Pac. 1117.

51 Helbig v. Grays Harbor etc. Co., 37 Wash. 130, 79 Pac. 612.

52 Greene v. Hereford (Ariz.), 95 Pac. 105.

53 Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Wilkinson v. Parrott, 32 Cal. 102; Garwood v. Wood, 34 Cal. 248; Mott v. Reyes, 45 Cal. 379; Campbell v. Pratt, 2 Pet. 354, 7 L. Ed. 449.

54 Broadus v. Nelson, 16 Cal. 80; Robinson v. Smith, 14 Cal. 254.

55 Peters v. Foss, 20 Cal. 586.

56 Clayton v. West, 2 Cal. 381; Carpentier v. Gardiner, 29 Cal. 160.

57 Hobbs v. Duff, 43 Cal. 485.

58 Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

59 Hebrard v. Jefferson G. & S. M. Co., 33 Cal. 290.

60 Chamberlin v. Lowenthal, 138 Cal. 47, 70 Pac. 932; Laloff v. Sterling, 31 Colo. 102, 71 Pac. 1113; Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918; Spokane etc. Co. v. Stanley, 25 Wash. 653, 66 Pac. 92.

61 Willard v. Mellor, 19 Colo. 534, 36 Pac. 148; Castagno v. Carpenter, 14 Colo. 524, 24 Pac. 392; Hegar v. De Groat, 3 N. Dak. 354, 56 N. W. 150; United States v. Alexander, 2 Idaho, 386, 17 Pac. 746; People v.

ruling, although technically erroneous, if not prejudicial to the rights of the party complaining, does not constitute reversible error.[62] Where the record shows that the appellant is not entitled to recover in any event, error in the rulings of the court upon the admission of evidence cannot entitle him to a reversal of the judgment.[63] So, generally speaking, an error of the court in ruling upon the admission of evidence that conclusively appears to be innoxious, and could have worked no prejudice to the party objecting, is no ground for reversal.[64] The admission of erroneous evidence is harmless, and no ground for reversal, when there is abundance of other evidence, without substantial conflict, to sustain the finding of fact which such evidence tends to prove.[65] So the rejection of evidence which, if admitted, would not have improved the case of the party offering it is not such error as should reverse the judgment.[66] The reception of immaterial or irrelevant testimony, when a cause is tried before a referee, is not of itself reversible error.[67] Nor is it reversible error where a witness is not permitted to answer a proper question, but at another time is allowed to answer it in effect.[68] The admission of incompetent testimony in rebuttal of immaterial evidence is

Neyce, 86 Cal. 393, 24 Pac. 1091; Denver Hardware Co. v. Croke, 4 Colo. App. 530, 36 Pac. 624; Brown v. Hillen, 4 Colo. App. 45, 34 Pac. 911; School District v. Ross, 4 Colo. App. 493, 36 Pac. 560; Denver Tramway Co. v. Reid, 4 Colo. App. 53, 500, 35 Pac. 269, 36 Pac. 557; Williams v. Carr, 4 Colo. App. 363, 36 Pac. 644.

62 Andrews v. Carlile, 20 Colo. 370, 38 Pac. 465; Brooks v. Bradford, 4 Colo. App. 410, 36 Pac. 303; Faust v. Goodnow, 4 Colo. App. 352, 36 Pac. 71; Quinby v. Tedford, 4 Colo. App. 210, 35 Pac. 276; Prairie School Township v. Haseleu, 3 N. Dak. 328, 55 N. W. 938; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Willard v. Carrigan, 8 Ariz. 70, 68 Pac. 538; Bickford v. Kirwin, 30 Mont. 1, 75 Pac. 518; Eager v. Mathewson, 27 Nev. 220, 74 Pac. 404.

63 McPhail v. Buell, 87 Cal. 115, 25 Pac. 266; McCroskey v. Mills, 32 Colo. 271, 75 Pac. 910; Goon v. Proctor, 27 Mont. 526, 71 Pac. 1003.

64 State v. McGahey, 3 N. Dak. 293, 55 N. W. 753; Dolan v. Paradice, 4 Colo. App. 314, 35 Pac. 987; State v. Kraft, 20 Or. 28, 23 Pac. 663; Norton v. Whitehead, 84 Cal. 263, 18 Am. St. Rep. 172, 24 Pac. 154; Gram v. Northern Pacific R. R. Co., 1 N. Dak. 252, 46 N. W. 972; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Crane v. Dexter etc. Co., 5 Wash. 479, 32 Pac. 223; Woo Dan v. Seattle etc. Power Co., 5 Wash. 466, 32 Pac. 103.

65 Silvarer v. Hansen, 77 Cal. 579, 20 Pac. 136; Mining Co. v. Haws, 7 Utah, 515, 27 Pac. 695; Benson v. Hart, 10 Wash. 301, 38 Pac. 1041.

66 Haley v. Elliott, 20 Colo. 379, 38 Pac. 771.

67 Rollins v. Board of Commissioners, 15 Colo. 104, 25 Pac. 319; Groth v. Kersting, 4 Colo. App. 395, 36 Pac. 156; Mining Co. v. Taylor, 100 U. S. 37, 25 L. Ed. 541.

68 Territory v. Collins, 6 Dak. 234, 50 N. W. 122.

harmless error.[69] And error in permitting a leading question to be asked is harmless when the question is upon an immaterial matter.[70] A judgment which is correct will not be overthrown because the reasoning of the trial court which led to the result may have been inaccurate.[71] Technical questions of practice are deemed unimportant upon appeal, where, notwithstanding them, the cause has been fully and fairly tried upon the evidence.[72] And in an equity proceeding the appellate court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein.[73] The refusal of the court to strike out improper remarks of counsel at the time of their utterance is harmless error, where the court later instructs the jury to disregard them.[74] Where the bill of exceptions does not contain, or purport to contain, all the evidence, an erroneous ruling in the admission of evidence cannot be held prejudicial on appeal.[75]

An appeal from an order made at the request of the appellant, and which could not operate to his prejudice, will not be considered.[76] Error arising in impaneling a jury is not prejudicial to the defendant, if, under the evidence presented to such jury, the court is warranted in instructing it to render a verdict for the plaintiff.[77] Denial of a motion for a continuance will not be disturbed on appeal, where it appears that the defendant did not use due diligence in endeavoring to secure the attendance or depositions of absent witnesses.[78] Refusal of the court to compel the plaintiff, on motion, to elect between two causes of action is not prejudicial error, if the election be made by the plaintiff at the opening of the trial.[79] A variance between the complaint and the evidence as to the date of a deed for lots, the title to which was taken by the defendant for the plaintiff as a resulting trust, is an error which should have been corrected by amendment; but such error is harmless, and is no ground for reversal.[80] Although

69 Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621.

70 Pilling v. Morse, 5 Wash. 797, 32 Pac. 748.

71 Warren v. Hall, 20 Colo. 508, 38 Pac. 767.

72 Delamater v. Smith, 14 Wash. 261, 44 Pac. 266.

73 Smith v. Taylor, 2 Wash. 422, 27 Pac. 812.

74 State v. Regan, 8 Wash. 506, 36 Pac. 472.

75 Brown v. Casey, 80 Cal. 504, 22 Pac. 257.

76 In re Radovich, 74 Cal. 536, 5 Am. St. Rep. 466, 16 Pac. 321.

77 Clancy v. Reis, 5 Wash. 371, 31 Pac. 971.

78 Oregon etc. Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415.

79 Van Hook v. Burns, 10 Wash. 22, 38 Pac. 763.

80 Thomas v. Jameson, 77 Cal. 91, 19 Pac. 177.

the court may have erroneously treated the trial of a cause as an action at law instead of in equity, and permitted a jury trial, yet the error will be regarded as harmless on appeal, when it appears from a review of the proofs, all of which had been preserved in the record, that the jury reached a correct conclusion and that the finding of the court must have been the same as that of the jury.[81] When prejudicial error affirmatively appears on the face of the record, the appellate court cannot presume that it was harmless. The matter rendering it harmless should appear in the bill of exceptions.[82]

§ 1924. Rule of conflict of evidence.—If the evidence clearly preponderates against the verdict or finding, it is the duty of the court below to set it aside, but the appellate court will not disturb the verdict or finding where the evidence is conflicting.[83] The judgment will not be reversed where there appears to have been a substantial conflict of evidence.[84] The rule applies to law and equity cases alike.[85] The same rule applies to the report of commissioners appointed to assess damages and estimate benefits in widening of streets.[86] But the rule does not apply where the evidence in the court below consists of depositions.[87]

§ 1925. Wrong reasoning.—An order granting a new trial will not be reversed because the reason assigned is a bad one, if there was a good reason for granting it.[88] The order stands upon the facts in the record.[89] If a judgment or order is right, that it could not be sustained upon the theory of law on which the court below proceeded is no reason for reversing it.[90] A judgment which is

81 Baker v. Bicknell, 14 Wash. 29, 44 Pac. 107.

82 Du Bois v. Perkins, 21 Or. 190, 27 Pac. 1044; Nickum v. Gaston, 24 Or. 380, 33 Pac. 671, 35 Pac. 31.

83 Hawkins v. Abbott, 40 Cal. 639; Phillpots v. Blasdel, 8 Nev. 61; Jensen v. Northern Pacific Ry. Co., 8 Idaho, 599, 70 Pac. 790; Pettyjohn v. Watkin, 11 Okla. 135, 66 Pac. 281.

84 Crook v. Forsyth, 30 Cal. 662; Wilkinson v. Parrott, 32 Cal. 102; McNeil v. Shirley, 33 Cal. 202; Hardenburgh v. Bacon, 33 Cal. 356; Hall v. Bark Emily Banning, 33 Cal. 522; Wendt v. Ross, 33 Cal. 650; Crawford v. Birkins, 16 Colo. App. 532, 66 Pac. 687; Salem etc. Co. v. Anson, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675.

85 Ritter v. Stock, 12 Cal. 402; Doe v. Vallejo, 29 Cal. 386.

86 Appeal of Piper, 32 Cal. 530; Appeal of Brooks and Josephs, 32 Cal. 558.

87 Wilson v. Cross, 33 Cal. 51, 91 Am. Dec. 617.

88 Bolton v. Stewart, 29 Cal. 615; Grant v. Moore, 29 Cal. 644.

89 Coghill v. Marks, 29 Cal. 673.

90 Munro v. Potter, 34 Barb. 358; Gillespie v. Torrance, 7 Abb. Pr. 462; Deland v. Richardson, 4 Denio, 95;

right will not be reversed because rendered upon a wrong reason.[91] Where a decision was correct when made, it will not be reversed by reason of any matter of fact not shown or offered in the court below.[92]

If a case is submitted to the jury on two theories, one erroneous and one correct, and the court on appeal cannot determine which theory the jury followed, the presumption is against the validity of the verdict.[93]

§ 1926. Legal presumptions.—The legal presumption is in favor of the correctness of the findings and decision of the court below, and when attacked on motion for new trial, will be sustained on appeal, unless it be affirmatively shown that they are erroneous. When this is attempted, by way of showing that certain specified facts other than those expressly found by the court were proved by the evidence, it must likewise appear that such facts would require a different finding or decision from the one rendered, or the specification will be held insufficient.[94] And where the facts found are such as might warrant different inferences, it will be assumed that the one drawn by the court was the one that would uphold rather than defeat the judgment.[95] On appeal, the presumption lies that the court below discharged its duty, that its proceedings were regular, and its action founded on proper proof, unless there is something in the record to overcome such presumption.[96] It is incumbent upon the appellant to show error

Davis v. Spencer, 24 N. Y. 386; Scott v. Pilkington, 15 Abb. Pr. 280; Mills v. Van Voorhies, 20 N. Y. 412.

91 Helm v. Dumars, 3 Cal. 454; Bleven v. Freer, 10 Cal. 172.

92 Wallace v. Eldredge (No. 2), 27 Cal. 498.

93 Empson Packing Co. v. Clawson, 43 Colo. 188, 95 Pac. 546.

94 White v. Abernathy, 3 Cal. 426; Landers v. Bolton, 26 Cal. 403; Moyes v. Griffith, 35 Cal. 556; Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384; Herriter v. Porter, 23 Cal. 385; Hastings v. Cunningham, 35 Cal. 549; Drummond v. Magruder, 9 Cranch, 122, 3 L. Ed. 677; The Potomac, 2 Black, 581, 17 L. Ed. 263; Jasper v. Hazen, 4 N. Dak. 1, 58 N. W. 454, 23 L. R. A. 58; Barthel v. Board of Education, 153 Cal. 376, 95 Pac. 892.

95 Nevills v. Moore Min. Co., 135 Cal. 561, 67 Pac. 1054.

96 Ford v. Holton, 5 Cal. 321; Owen v. Morton, 24 Cal. 378; Dimick v. Campbell, 31 Cal. 238; Sharp v. Daughney, 33 Cal. 512; Moore v. Massini, 43 Cal. 389; Wilson v. Dougherty, 45 Cal. 34; People v. Colson, 49 Cal. 679; Crane v. Brannan, 3 Cal. 185; Van Slyck v. Taylor, 9 Johns. 146; Lamotte v. Archer, 4 E. D. Smith, 46; Beattie v. Qua, 15 Barb. 132; Oakley v. Van Horn, 21 Wend. 305; Darby v. Callaghan, 16 N. Y. 71; United States Trust Co. v. United States Fire Ins. Co., 18 N. Y. 199; Carman v. Pultz, 21 N. Y. 547; Hoyt v. Hoyt, 8 Bosw. 511; Andrews v. Carlile, 20 Colo. 370, 38 Pac. 465.

affirmatively.[97] But when an error against the appellant is shown, injury to him is presumed, and it devolves upon the respondent to show that no injury has in fact been done.[98] All intendments should be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary.[99] All presumptions on appeal are in favor of the verdict.[100] Where the record does not affirmatively disclose the fact of non-waiver of findings, the appellate court will presume, in support of a judgment, that findings were duly waived.[101] It will be presumed that the record contains all the evidence.[102] A refusal to allow an amendment is presumed to be right unless the character of the proposed amendment is shown in the record.[103] If the instructions to the jury appear in the record, but the evidence or facts do not, the instructions will be presumed to be correct, and warranted by the facts.[104] In the absence of the instructions given to the jury, the presumption is that the law applicable to the facts was correctly stated by the court.[105] Where a decree

97 People v. Gibson, 106 Cal. 458, 39 Pac. 864; People v. Gillis, 97 Cal. 542, 32 Pac. 586; People v. Douglass, 100 Cal. 1, 34 Pac. 490; People v. Otto, 77 Cal. 50, 18 Pac. 872; City of Helena v. Brule, 15 Mont. 429, 39 Pac. 456, 852; Wright v. Ascheim, 4 Utah, 455, 11 Pac. 580.

98 Duff v. Duff, 71 Cal. 513, 12 Pac. 570; Hausman v. Hausling, 78 Cal. 283, 20 Pac. 570; Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861. Now otherwise in California, under Code Civ. Proc., § 475, as amended 1897.

99 Von Schmidt v. Von Schmidt, 104 Cal. 547, 38 Pac. 361; Caruthers v. Hensley, 90 Cal. 559, 27 Pac. 411; Lee Chuck v. Quan Wo Chong, 91 Cal. 592, 28 Pac. 44; Davis v. Lezinsky, 93 Cal. 126, 28 Pac. 811; Antonelle v. Board of New City Hall Commrs., 92 Cal. 228, 28 Pac. 270; Toulouse v. Burkett, 2 Idaho, 288, 13 Pac. 172; Montandon v. Walker, 2 Idaho, 165, 9 Pac. 608; Sheehy v. Shinn, 103 Cal. 325, 37 Pac. 393; Treat v. Dorman, 100 Cal. 623, 35 Pac. 86; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

100 Lynn v. Southern Pacific Co., 103 Cal. 7, 36 Pac. 1018, 24 L. R. A. 710; Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657.

101 Garr v. Spaulding, 2 N. Dak. 414, 51 N. W. 867; Haynes v. Roberts, 4 Utah, 405, 11 Pac. 512.

102 Orcutt v. Cahill, 24 N. Y. 578; Calligan v. Mix, 12 How. Pr. 495; Ford v. Holton, 5 Cal. 322; Hroch v. Aultman, 3 S. Dak. 477, 54 N. W. 269. See Estate of Yoakam, 103 Cal. 503, 37 Pac. 485; Warner v. United States etc. Assoc., 8 Utah, 431, 32 Pac. 696.

103 Jessup v. King, 4 Cal. 331.

104 People v. McCauley, 1 Cal. 386; People v. Baker, 1 Cal. 405; White v. Abernathy, 3 Cal. 426.

105 Aldrich v. Palmer, 24 Cal. 515; Cattle Co. v. Slaughter, 6 Utah, 278, 21 Pac. 997.

recited that the entry thereof was consented to by defendants, it will be presumed, when attacked collaterally, that the consent was given in such manner as to give the court jurisdiction of their persons.[106] The presumption is that all the facts in a record bearing on the points decided have received due consideration by the supreme court, whether all or a part or none of those facts are mentioned in the opinion.[107] Where there are two presumptions equally reasonable, arising upon the face of the record, the court is bound to adopt that which will maintain the judgment of the court below.[108]

Where the record does not disclose a request for findings, or that any were in fact made, all findings necessary to support the judgment will be presumed.[109]

§ 1927. Evidence.—On appeal it will be presumed that the evidence in support of a finding was received without objection, in the absence of any showing to the contrary.[110] Where there has been no objection raised or exceptions taken to insufficiency of the evidence, the court will presume that proper evidence was given.[111] The presumption of law is that there was evidence to sustain every material fact found by the jury,[112] and that facts imperfectly alleged have been proved.[113] When the record does not purport to contain all the evidence introduced, the presumption arises that the evidence omitted warranted the judgment.[114] In the absence of the evidence its sufficiency to sustain the findings will be presumed.[115]

§ 1928. Practice.—Where the record merely shows that the defendant's motion for a new trial was denied, but does not disclose the grounds for the motion, it will not be assumed that the errors

106 Thompson v. Connolly, 42 Cal. 313.

107 Mulford v. Estudillo, 32 Cal. 131.

108 Whipley v. Flower, 6 Cal. 630.

109 Slater etc. Co. v. Shackleton, 30 Mont. 390, 76 Pac. 805.

110 Beardsley v. Clem, 137 Cal. 328, 70 Pac. 175.

111 Bunting v. Beideman, 1 Cal. 182.

112 Doll v. Anderson, 27 Cal. 248; Rathbun v. Thurston Co., 2 Wash. 564, 27 Pac. 448.

113 Barron v. Frink, 30 Cal. 486.

114 Irwin v. Locke, 20 Colo. 148, 36 Pac. 898; Colorado etc. Live Stock Co. v. Godding, 20 Colo. 249, 38 Pac. 58; Tanner v. Townsend, 4 Colo. App. 543, 36 Pac. 908; United States v. Groesbeck, 4 Utah, 487, 11 Pac. 542. See Woody v. Bennett, 88 Cal. 241, 26 Pac. 117; Woods v. Courtney, 16 Or. 121, 17 Pac. 745; Schoolfield v. Brunton, 20 Colo. 139, 36 Pac. 1103.

115 Estate of Sharp, 78 Cal. 483, 21 Pac. 182; Winterburn v. Chambers, 91 Cal. 170, 27 Pac. 658; Luck v. Luck, 92 Cal. 653, 28 Pac. 787.

complained of on appeal were the ones urged on the motion.[116] It must be shown that the court erred in striking out the answer; error will not be presumed.[117] When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact, and a judgment rendered, the presumption will be indulged, on appeal, that the issue of law had been first disposed of.[118] Exceptions appearing in the case as settled will be assumed to have been taken in due time and form.[119] Where the record shows that a general demurrer was filed, but is silent as to how it was disposed of, it will be presumed that it was overruled or abandoned.[120] Where the record shows that a charge was given which is not brought into the appellate court for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.[121] Where no findings appear to have been made upon an issue, it will be presumed that they were in favor of the respondent.[122] When there is nothing in the record and no evidence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by the statute, the presumption is in favor of the court's observance of the law.[123] When no brief is filed by the appellant calling attention to any error in the judgment-roll, the court will presume that there is none.[124] Where the record does not show that any objection was taken by either party to the mode of procedure on the trial, it will be presumed to have been adopted by consent.[125]

§ 1929. When judgment will be affirmed.—The judgment of the court below will be sustained if there is one conclusive ground upon which it can rest,[126] as in absence of a bill of exceptions or assignment of errors from the records.[127] When a judgment is

116 Thompson v. Hays, 24 Utah, 275, 67 Pac. 670.

117 Dimick v. Campbell, 31 Cal. 238; Landers v. Bolton, 26 Cal. 393. See Cleland v. Walbridge, 78 Cal. 358, 20 Pac. 730.

118 Brooks v. Douglass, 32 Cal. 208; Townsend v. Jemison, 7 How. 706, 12 L. Ed. 880.

119 Hunt v. Bloomer, 13 N. Y. 341.

120 United States v. Alexander, 2 Idaho, 386, 17 Pac. 746.

121 Hopkins v. Utah etc. By. Co., 2 Idaho, 300, 13 Pac. 343.

122 Princeton Min. Co. v. First Nat. Bank, 7 Mont. 530, 19 Pac. 210.

123 Kent v. Favor, 3 N. Mex. 218 (347), 5 Pac. 470.

124 Steuffen v. Jefferis, 9 Mont. 66, 22 Pac. 152. As to presumption where respondent fails to argue case, see Richter v. Fresno etc. Irr. Co., 101 Cal. 582, 36 Pac. 96.

125 Shepherd v. Jones, 71 Cal. 223, 16 Pac. 711.

126 Bleven v. Freer, 10 Cal. 172; McCrea v. McGrew, 9 Idaho, 382, 75 Pac. 67.

127 Coulter v. Hamilton, 41 Colo. 168, 91 Pac. 1105.

correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the court below.[128] It is no objection to an affirmance that judgment can only be sustained on grounds that were not suggested by counsel below.[129] When the supreme court is equally divided upon an appeal, the judgment stands affirmed.[130] The supreme court will not generally set aside a verdict where the judge and jury harmonize in its support.[131] Where substantial justice has been done, the appellate court will not reverse the judgment on merely technical grounds,[132] or for a mere variance.[133] If the appellant can gain nothing by a new trial, judgment will not be reversed.[134] A judgment will not be reversed for errors that can in no respect injure the appellant.[135] On appeal from judgment on a demurrer as frivolous, judgment should be affirmed if the demurrer was bad, though not frivolous.[136] If an appellate court finds that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the judgment must be reversed, though counsel may not have hit on the proper grounds for asking a reversal.[137] Where the questions raised by the record have been repeatedly settled by the appellate court, or are decided by reference to plain elementary principles of law, the judgment will be affirmed, with damages.[138] When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal, in order to allow the amendment. There must be error in order to allow the

128 Kidd v. Teeple, 22 Cal. 255; McDonald v. McLeod, 3 Colo. App. 344, 33 Pac. 285; Otis v. Spencer, 16 N. Y. 610, 15 How. Pr. 425, 6 Abb. Pr. 127; Titus v. Orvis, 16 N. Y. 617. Compare, San Marcial etc. Imp. Co. v. Stapleton, 4 N. Mex. 33 (8), 12 Pac. 621; Barry v. Coughlin, 90 Cal. 220, 27 Pac. 197.

129 Oneida Bank v. Ontario Bank, 21 N. Y. 490; White v. Madison, 26 N. Y. 117.

130 Etting v. United States Bank, 11 Wheat. 59, 6 L. Ed. 419; The Antelope, 10 Wheat. 66, 6 L. Ed. 268; Washington Bridge Co. v. Stewart, 3 How. 413, 11 L. Ed. 658; Luco v. De Toro, 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543. See Frankel v. Deidesheimer, 93 Cal. 73, 28 Pac. 794.

131 Antoine Co. v. Ridge Co., 23 Cal. 219.

132 Fisher v. Reider, Hempst. 82, Fed. Cas. No. 4822a.

133 Cook v. Gray, Hempst. 84, Fed. Cas. No. 3156a.

134 Larco v. Casaneuava, 30 Cal. 560.

135 Thompson v. Lyon, 14 Cal. 39; Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

136 Witherhead v. Allen, 28 Barb. 661; Wesley v. Bennett, 5 Abb. Pr. 498; Martin v. Kanouse, 2 Abb. Pr. 327; Griswold v. Laverty, 12 N. Y. Leg. Obs. 316; Manning v. Tyler, 21 N. Y. 570.

137 Van Doren v. Tjader, 1 Nev. 380, 90 Am. Dec. 498.

138 Pinkham v. Wemple, 12 Cal.

reversal of a judgment.[139] The appellate court will not reverse a decision, after a trial on the merits, for defects in the declaration which were amenable in the court below.[140]

When the case made by plaintiff's proof differs from the averments of the complaint, and defendant does not object to the introduction of evidence on this ground, the court will not reverse the judgment on account of the variance.[141] An order of the court below, granting a new trial, will not be disturbed where the statement contains only an outline of the evidence, without any rulings or instructions of the court, and not purporting to give all the evidence, and that given not being clearly in favor of the verdict; the appellate court will not interfere.[142] Where there are no assignments of errors by the appellant, judgment will be affirmed. Affirmative error must be shown.[143] Error which prejudices the plaintiff only to the extent of a few cents,[144] or even a few dollars, will not warrant reversal.[145] On an appeal from an order made after final judgment, directing the receiver to pay over to the prevailing party money in his hands, the supreme court cannot reverse the order appointing the receiver.[146] A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. This court will not reverse a judgment dismissing an action for want of prosecution, unless there has been an abuse of discretion in the court below in giving the judgment; and it devolves on the appellant to show such abuse of discretion.[147] In Pennsylvania, it has been held that a judgment will not be reversed because the court below erred in prescribing the order in which counsel should address the jury.[148] Where the findings do not contain all the facts necessary to be proved in order to entitle the prevailing party

449; Field v. Campbell, 17 La. Ann. 30.

139 Sutter v. San Francisco, 36 Cal. 112.

140 Shoenberger's Exrs. v. Zook, 34 Pa. St. 24.

141 Marshall v. Ferguson, 23 Cal. 66.

142 Loucks v. Edmondson, 18 Cal. 203.

143 People v. Goldbury, 10 Cal. 312; Raymond v. Spicer, 6 Dak. 45, 50 N. W. 399; Adams v. Bankers' L. Assoc., 13 Mont. 222, 33 Pac. 192; Leete v. Sutherland, 20 Nev. 71, 15 Pac. 472; Dold v. Robertson, 3 N. Mex. 313 (520), 9 Pac. 302; People v. Levison, 16 Cal. 98, 76 Am. Dec. 505.

144 Hopkins v. Kitts, 37 Mont. 26, 94 Pac. 201.

145 Baldwin v. Brown, 48 Wash. 303, 93 Pac. 413.

146 Whitney v. Buckman, 26 Cal. 451.

147 Grigsby v. Napa County, 36 Cal. 585, 95 Am. Dec. 213.

148 Smith v. Frazier, 53 Pa. St. 226.

to a judgment, it will not be reversed, unless the court below has, after defect has been pointed out, failed or refused to make the required finding, and exception has been taken thereto.[149] If the facts in issue are not found, and the evidence is not set out in the transcript, the appellate court will not undertake to say that it was proved. Evidence tending to prove a fact does not necessarily amount to proof of the fact.[150] Where the findings support the judgment, and the record discloses no exceptions to admission of evidence or the rulings of the court, the judgment will be affirmed.[151] A judgment will not be reversed on the findings alone, unless they show affirmatively that the judgment could not properly have been rendered.[152] A judgment on the report of a referee will not be reversed for failure to find on issues, where no evidence would warrant findings in favor of the appellant.[153] The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party, or to sustain the findings as made.[154] Where the only question involved is one of fact, and the evidence, though conflicting, supports the referee's report, the decree will be affirmed.[155] A verdict will not be disturbed if the evidence is sufficient to support it.[156] The judgment or order appealed from will be affirmed without an examination of the record, if the appellant neglects to file any brief.[157] If an appeal is taken for delay the judgment will be affirmed with damages.[158] A judgment may be affirmed in

149 Lyons v. Leimback, 29 Cal. 139. But see Dowd v. Clarke, 51 Cal. 262.

150 Merrill v. Chapman, 34 Cal. 251.

151 Hutchinson v. Ryan, 11 Cal. 142; Clark v. Huber, 20 Cal. 196. And see, to same effect, Cooper v. Kellogg, 2 Idaho, 330, 13 Pac. 350; McGuire v. Lamb, 2 Idaho, 378, 17 Pac. 749; Fisk v. Patton, 7 Utah, 410, 27 Pac. 1; Dorris v. Sullivan, 89 Cal. 62, 26 Pac. 621; Jackson v. Brown, 82 Cal. 275, 23 Pac. 142; Moore v. Moody, 88 Cal. 273, 26 Pac. 109; Peck v. Rees, 7 Utah, 475, 27 Pac. 581, 13 L. R. A. 714; Eastman v. Cook, 90 Cal. 238, 27 Pac. 191.

152 Semple v. Cook, 50 Cal. 26.

153 Alger v. Raymond, 7 Bosw. 418.

154 Lovejoy v. Chapman, 23 Or. 571, 32 Pac. 687; Bruce v. Phœnix Ins. Co., 24 Or. 486, 34 Pac. 16.

155 Hummel v. Friese, 24 Or. 586, 29 Pac. 438; Buchtel v. Bode, 24 Or. 587, 29 Pac. 438. See Salt Lake etc. Machine Co. v. Mammoth Min. Co., 6 Utah, 351, 23 Pac. 760; Maxfield v. West, 6 Utah, 379, 24 Pac. 98.

156 Brasen v. Seattle etc. Ry. Co., 4 Wash. 754, 31 Pac. 34; Dillon v. Folsom, 5 Wash. 439, 32 Pac. 216. See Toponce v. Corinne etc. Stock Co., 6 Utah, 439, 24 Pac. 534.

157 Drexler v. Seal Rock Tobacco Co., 78 Cal. 624, 21 Pac. 372; Faris v. Lampson, 73 Cal. 191, 14 Pac. 674; Tucker v. Constable, 16 Or. 239, 17 Pac. 878; State v. McGinnis, 17 Or. 332, 20 Pac. 632; Matthewson v. Boyle, 20 Nev. 88, 16 Pac. 434. See Gavin v. Gavin, 92 Cal. 292, 28 Pac. 567.

158 Gieske v. Anderson, 77 Cal. 247, 19 Pac. 421. Cross-appeals, as to

part and reversed in part.[159] Motion to affirm judgment must be on notice to opposite party.[160]

§ 1930. **Modification of judgment.**—Where the judgment below is erroneous, the appellate court will so modify it as finally to settle the controversy, where the rights of the parties appear from the record to be fully ascertained.[161] A judgment will be modified and affirmed where there is an error which the record enables the appellate court fully to correct.[162] Where, in ejectment against several defendants, the judgment for damages is several instead of joint, the damages may be remitted, and the judgment for the land may stand.[163] Respondent may remit damages, and pay costs of appeal;[164] or the excess of damages over amount claimed may be remitted, and the judgment stand.[165] The judgment of a court can only be changed on a petition for rehearing or a modification.[166] The court may direct that judgment be affirmed on respondent's remitting that part of it which is erroneous, if capable of exact calculation.[167] The supreme court may refuse to modify its judgment of reversal, though an offer to remit the damages is made.[168] A case may be remanded, with directions to add to the judgment the yearly rent of land, as found by the jury.[169] A judgment may be modified by deducting the interest which was improperly included, and, as modified, will be

affirmance of one without affecting the other, see State v. Central Pacific R. R. Co., 21 Nev. 172, 26 Pac. 225, 1109.

159 Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336. As to denial of appellee's motion for affirmance, see Wheeler v. Fick, 4 N. Mex. 149 (303), 13 Pac. 217. Excessive damages, when verdict not disturbed, see Naylor v. Salt Lake City, 9 Utah, 491, 35 Pac. 509.

160 McCarty v. Wintler, 17 Or. 391, 21 Pac. 195.

161 Persse v. Cole, 1 Cal. 369; Gahan v. Neville, 2 Cal. 81; Bidleman v. Kewan, 2 Cal. 249; Williams v. Santa Clara etc. Co., 66 Cal. 193, 5 Pac. 85.

162 Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621; Ivenson v. Caldwell, 3 Wyo. 465, 27 Pac. 563; Rio Grande etc. R. R. Co. v. Deasey, 3 Colo. App. 196, 32 Pac. 725.

163 Curtis v. Herrick, 14 Cal. 117, 73 Am. Dec. 632.

164 Doll v. Feller, 16 Cal. 432; La Motte v. Archer, 4 E. D. Smith, 46.

165 Pierce v. Payne, 14 Cal. 419; Behlow v. Shorb, 91 Cal. 141, 27 Pac. 546; Herman v. Paris, 81 Cal. 625, 22 Pac. 971.

166 Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

167 Boyd v. Foot, 5 Bosw. 110; McAuley v. Mildrum, 9 Abb. Pr. 198; Corning v. Corning, 6 N. Y. 97; Moffet v. Sackett, 18 N. Y. 522; Markell v. Matthews, 3 Colo. App. 49, 32 Pac. 176; O'Shea v. Kirker, 4 Bosw. 120, 8 Abb. Pr. 69.

168 Ellis v. Jeans, 26 Cal. 272.

169 Bay v. Pope, 18 Cal. 694.

affirmed.[170] But when part of the recovery is erroneous, and it cannot be definitely ascertained what part could be legitimately sustained, the judgment cannot be modified and permitted to stand, but must be reversed.[171] Where there is a discrepancy between the findings of fact and the judgment, the appellate court will order the proper modification of the judgment.[172] The appellate court, in reversing a judgment and directing the entry of a judgment in the court below, does not order a new trial. When the appellate court directs the court below what judgment to render, instead of directing it to modify its judgment, it is a reversal of the judgment of the court below.[173] A judgment cannot be affirmed as to part of the amount recovered, and reversed as to the residue, as between the same parties, where a new trial is granted as to the part reversed.[174]

When the pleadings are ambiguous and do not clearly define the rights insisted upon, and one of the parties has been misled to his prejudice, by failing to offer testimony, a decree will be vacated, to give an opportunity for the introduction of further testimony.[175]

Where an appeal is only from an order denying a new trial, the appellate court may go back to the complaint and strike out one or more causes of action, and may modify the judgment.[176] In an action for the recovery of chattels, the supreme court should modify the judgment by making it in the alternative for the return of the property or for its value.[177] Where the judgment is in harmony with the pleadings and findings of fact, but erroneous by reason of a variance between the findings and proof, the judgment will not be modified to suit the proof.[178] Where only one of several defendants against whom a judgment had been rendered appeals, the appellate court, if it reverses the judgment, may reverse or modify it as to any or all the parties defendant. But where, in such case, the error assigned only affects the party appealing, the court will not presume error as to the parties not appealing, and will not reverse the judgment as to them;[179] or

170 Pettit v. Thalheimer, 8 Colo. App. 355, 33 Pac. 277.

171 Eaton v. Larimer etc. Reservoir Co., 3 Colo. App. 366, 33 Pac. 278.

172 Clark v. Huber, 20 Cal. 196.

173 Argenti v. San Francisco, 30 Cal. 458.

174 Story v. New York & Harlem R. R. Co., 6 N. Y. 85.

175 McPhee v. Kelsey, 45 Or. 290, 78 Pac. 224.

176 Argenti v. San Francisco, 30 Cal. 458.

177 Fitzhugh v. Wiman, 9 N. Y. 559; O'Shea v. Kirker, 4 Bosw. 120.

178 Clark v. Huber, 20 Cal. 196.

179 Minturn v. Bayles, 33 Cal. 129; Ricketson v. Richardson, 26 Cal. 149.

a judgment may be reversed as to part of the amount, and affirmed as to the rest;[180] and costs will be awarded in favor of the one as to whom judgment was reversed.[181] The law regards the substance more than the form, and the appellate court will compel the court below to issue an attachment to punish a contempt which is in substance a private right, though in form a case of contempt.[182] If the judgment is erroneous, and the findings of fact will enable the supreme court to determine what kind of a judgment should have been rendered, it will direct the court below to render the proper judgment.[183]

Where the appellee admits that the judgment appealed from is incorrect, the supreme court may modify the judgment to conform to the admissions of the appellee.[184] After the time fixed by law or well-established practice, a judgment which is neither void on its face, nor affected by fraud in its procurement or want of jurisdiction, stands for absolute verity, and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify, or otherwise affect it.[185] Nor will the appellate court modify a judgment upon appeal, where, in

Consult, also, Montgomery Bank v. Albany Bank, 7 N. Y. 459; Giraud v. Beach, 4 E. D. Smith, 27; Williams v. Christie, 4 Duer, 29; Fields v. Moul, 15 Abb. Pr. 6.

180 Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 314; Staats v. Hudson River R. R. Co., 39 Barb. 298; Pinckney v. Keyler, 4 E. D. Smith, 469; Rosenbaum v. Gunter, 3 E. D. Smith, 203; Fitch v. Hammer, 17 Colo. 591, 31 Pac. 336; Fields v. Moul, 15 Abb. Pr. 6; overruling Kasson v. Mills, 8 How. Pr. 377. Even when for entire damages, see Decker v. Hassel, 26 How. Pr. 528; Fields v. Moul, 15 Abb. Pr. 6.

181 Montgomery County Bank v. Albany City Bank, 7 N. Y. 459.

182 Merced County v. Fremont, 7 Cal. 130.

183 Love v. Shartzer, 31 Cal. 488. See, as to awarding proper judgment, or modifying judgment when all the facts are before the court, Gage v. Brewster, 31 N. Y. 218; McDougall v. Cooper, 31 N. Y. 498; People v. Supervisors of Richmond, 28 N. Y. 112; Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Brownell v. Winnie, 29 N. Y. 400, 86 Am. Dec. 314, 29 How. Pr. 193; In re Livingston's Petition, 34 N. Y. 555, 32 How. Pr. 20, 2 Abb. Pr. (N. S.) 1; Wagner v. Law, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784; Reynolds v. Reynolds, 67 Cal. 176, 7 Pac. 480; Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 Pac. 344; State v. Superior Court, 8 Wash. 591, 36 Pac. 443. As to modification of judgment to conform to special verdict, see Kullmann v. Greenebaum, 84 Cal. 98, 24 Pac. 49. As to modification of void judgment, see Bell v. Waudby, 7 Wash. 203, 34 Pac. 917. As to modification of judgment in action of claim and delivery, see Meads v. Lasar, 93 Cal. 530, 29 Pac. 125. As to modification of decree, see Irrigation Co. v. Stock Co., 7 Utah, 456, 27 Pac. 578.

184 Blackwell v. Hatch, 13 Okla. 169, 73 Pac. 933.

185 Wolferman v. Bell, 8 Wash. 140, 35 Pac. 603.

order to do so, it must make a finding different from that made by the court below, but will reverse the judgment and remand the cause for a new trial.[186]

§ 1931. Reversal of judgment.—When the judgment of the court below, actually entered, is erroneous, it must be reversed, although if it had followed the opinion of the court rendering it it would have been correct.[187] On an appeal from a judgment, if an error has been committed which may by possibility have prejudiced appellant, judgment must be reversed.[188] A judgment against clear, uncontradicted, and unimpeached evidence must be reversed.[189] But the uncontradicted evidence of an interested witness, as a party in the suit may be disregarded.[190] And where judgment was for the defendant, if error is disclosed in the admission of improper testimony in defendant's favor, the judgment will be reversed, and a new trial ordered, without considering whether or not the plaintiff proved a case entitling him to relief.[191] Where the evidence is conflicting, the supreme court will not reverse the order of the court below denying a new trial.[192] If erroneous or illegal evidence is admitted, and the record does not negative the presumption that injury was sustained thereby, the judgment will be reversed,[193] though the defendant did not appear on the trial;[194]

186 Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532.

187 Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

188 Brown v. Richardson, 20 N. Y. 472; Erben v. Lorillard, 19 N. Y. 299; Williams v. Fitch, 18 N. Y. 546; Underhill v. New York etc. R. R. Co., 21 Barb. 489; Worrall v. Parmelee, 1 N. Y. 519, 49 Am. Dec. 350; Weber v. Kingsland, 8 Bosw. 415; Hahn v. Van Doren, 1 E. D. Smith, 411; Clark v. Vorce, 19 Wend. 232; Farmers etc. Bank v. Whinfield, 24 Wend. 419; Gillet v. Mead, 7 Wend. 193; Clarke v. Dutcher, 9 Cow. 674.

189 Evans v. Wood, 15 Abb. Pr. 416; Armstrong v. Smith, 44 Barb. 120; Jacks v. Darrin, 3 E. D. Smith, 557; Goldsmith v. Obermeier, 3 E. D. Smith, 121; Conlan v. Latting, 3 E. D. Smith, 354; Orcutt v. Cahill, 24 N. Y. 578; Fox v. Decker, 3 E. D. Smith, 150.

190 Roberts v. Gee, 15 Barb. 449.

191 Reddington v. Waldon, 22 Cal. 185.

192 Preston v. Keys, 23 Cal. 194; Lane v. Brown, 22 Ind. 239. See Amter v. Conlon, 3 Colo. App. 185, 32 Pac. 721; Polk v. Mook, 10 Colo. 326, 15 Pac. 615; Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. 891.

193 Roff v. Duane, 27 Cal. 565; Lalley v. Wise, 28 Cal. 539; Worrall v. Parmelee, 1 N. Y. 519, 49 Am. Dec. 350; Marquand v. Webb, 16 Johns. 89; Osgood v. Manhattan Co., 3 Cow. 612; Tappan v. Butler, 7 Bosw. 480; Main v. Eagle, 1 E. D. Smith, 621; Hahn v. Van Doren, 1 E. D. Smith, 411; Belden v. Nicolay, 4 E. D. Smith, 14.

194 Squier v. Gould, 14 Wend. 159; Finch v. McDowell, 7 Cow. 537; McNutt v. Johnson, 7 Johns. 18; Lynch v. McBeth, 7 How. Pr. 113.

and so where judgment was entirely unsupported by evidence;[195] or if competent evidence was excluded which might possibly have changed the result.[196] The admission of improper testimony will not necessarily cause the reversal of a judgment supported by sufficient competent evidence.[197] The supreme court will reverse the judgment of the court below where the facts found by the court are not sufficient to support the judgment.[198] If a judgment was rendered before the Code of Civil Procedure took effect, and there was no finding of facts or agreed statement of facts, the supreme court, on reversing the judgment, will not direct judgment to be entered in favor of the losing party.[199] For error in refusing to give instructions to the jury the judgment will be reversed;[200] or for any error in a charge which might have misled the jury;[201] or for error in a charge of the judge;[202] or for refusal to charge on a proper request.[203] A judgment rendered by the district court after the time appointed by law for its adjournment will be reversed.[204] Even though a judgment appears to be correct on the merits, it will be reversed for a mistrial.[205] An order of the court below setting aside a judgment, where it does not appear that a copy of the order to show cause why the judgment should not be

195 Davidson v. Hutchins, 1 Hilt. 123; Storp v. Harbutt, 4 E. D. Smith, 464; Hunt v. Westervelt, 4 E. D. Smith, 225; Calligan v. Mix, 12 How. Pr. 495; Howard v. Brown, 2 E. D. Smith, 247; Wiley v. Slater, 22 Barb. 506; Fish v. Skut, 21 Barb. 333; Rathbone v. Stanton, 6 Barb. 141. See, also, Bugh v. Rominger, 15 Colo. 452, 24 Pac. 1046; Wachamuth v. Heil, 1 Colo. App. 196, 28 Pac. 17; Cross v. Kistler, 14 Colo. 571, 23 Pac. 903; Wise v. Williams, 88 Cal. 30, 25 Pac. 1064; Ede v. Knight, 93 Cal. 159, 28 Pac. 860; Smith v. Belshaw, 89 Cal. 427, 26 Pac. 834; Chicago Investment Co. v. Harrison, 1 Colo. App. 466, 29 Pac. 462; Denver etc. R. R. Co. v. Morton, 3 Colo. App. 155, 32 Pac. 345; Abbott v. Smith, 3 Colo. App. 264, 32 Pac. 843; Freedman v. Gordon, 4 Colo App. 343, 35 Pac. 879.

196 McAllister v. Sexton, 4 E. D. Smith, 41; Raymond v. Richardson, 4 E. D. Smith, 171; Tuttle v. Hunt, 2 Cow. 436; Irvine v. Cook, 15 Johns. 239; Penfield v. Carpender, 13 Johns. 350; Haswell v. Bussing, 10 Johns. 128; Martin v. Garrett, 4 E. D. Smith, 346.

197 Welch v. Mayer, 4 Colo. App. 440, 36 Pac. 613. See Standard etc. Ins. Co. v. Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

198 Davis v. Caldwell, 12 Cal. 125.

199 The Central Pacific R. R. Co. v. Robinson, 49 Cal. 446.

200 Busenius v. Coffee, 14 Cal. 91; De Benedetti v. Mauchin, 1 Hilt. 213.

201 Pettit v. Ide, 12 Abb. Pr. 44.

202 Whitney v. Wells, 28 How. Pr. 150; Pettit v. Ide, 12 Abb. Pr. 44.

203 De Benedetti v. Mauchin, 1 Hilt. 213; Halloran v. New York etc. R. R. Co., 2 E. D. Smith, 257.

204 Smith v. Chichester, 1 Cal. 409.

205 Cobb v. Cornish, 6 Abb. Pr. 129, 16 N. Y. 602; Gilbert v. Beach, 16 N. Y. 606; Purchase v. Mattison, 15 Abb. Pr. 402.

set aside was served on plaintiff or his attorney, will be reversed on appeal.[206]

A judgment by default will be reversed, unless the record show service on the defendant or appearance.[207] If the plaintiff admits in the pleadings that he never had a cause of action, the supreme court will reverse the judgment, and either order a judgment in defendant's favor or remand the cause for further proceedings.[208] Where the complaint fails to state facts sufficient to constitute a cause of action, judgment by default thereon will be reversed on appeal.[209] The judgment of a court on a second trial, an appeal from the first trial being taken and perfected, will be reversed, because the court could not proceed with the second trial until the appeal from the order was determined.[210] If a company is sued by a wrong name, but answers by its true name, and judgment is rendered against it by its true name, the judgment is not void, and the supreme court, on appeal, in affirming the judgment, will direct the court below to substitute the true name in the complaint.[211]

§ 1932. The same—Continued.—It is not error simply, but error legally excepted to, that constitutes ground for reversal.[212] Immaterial or non-prejudicial error is not ground for reversal.[213] The admission of testimony that has no bearing upon the issues as made by the pleadings, but which, from its nature, would tend to prejudice the jury against the party objecting, constitutes reversible error.[214] Where the error consists in the infraction of a

206 Vallejo v. Green, 16 Cal. 160.

207 Schloss v. White, 16 Cal. 65; Burt v. Scrantom, 1 Cal. 416; Joyce v. Joyce, 5 Cal. 449.

208 Mulford v. Estudillo, 32 Cal. 131; Barron v. Frink, 30 Cal. 486.

209 Hallock v. Jaudin, 34 Cal. 167.

210 Ford v. Thompson, 19 Cal. 119.

211 Mahon v. San Rafael T. R. Co., 49 Cal. 270.

212 Kearney v. Snodgrass, 12 Or. 311, 7 Pac. 309. See City of Durango v. Luttrell, 18 Colo. 123, 31 Pac. 853.

213 Schoolfield v. Houle, 13 Colo. 394, 22 Pac. 781; Wray v. Carpenter, 16 Colo. 271, 25 Am. St. Rep. 265, 27 Pac. 248; St. Kevin Min. Co. v. Isaacs, 18 Colo. 400, 32 Pac. 822; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Zumwalt v. Dickey, 92 Cal. 156, 28 Pac. 212; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892; Alexander v. Central etc. Mill Co., 104 Cal. 532, 38 Pac. 410; White v. Johnson, 10 Idaho, 438, 79 Pac. 455; People's Bank v. Frick, 13 Okla. 179, 73 Pac. 949.

214 McMillen v. Aitchison, 3 N. Dak. 183, 54 N. W. 1030; First Nat. Bank v. Carson, 30 Neb. 104, 46 N. W. 276; Jones v. Bacon, 19 N. Y. Supp. 553. See, also, as to what constitutes prejudicial or reversible error, Slattery v. Donnelly, 1 N. Dak. 264, 47 N. W. 375; Taylor v. Rice, 1 N. Dak. 72, 44 N. W. 1017; Johnson v. Dakota etc. R. R. Co., 1 N. Dak. 354, 48 N. W. 227; Comaskey v. Northern Pac. R. R. Co., 3 N. Dak. 276, 55 N. W. 732; Hutchinson v.

constitutional guaranty in favor of personal liberty, the law will presume an injury, and adjudge accordingly.[215] But when errors in the admission or rejection of testimony could in no way have affected the result, they are not grounds for reversal.[216] A judgment will not be reversed because testimony proper for rebuttal was brought out on cross-examination.[217] If the trial court excludes evidence which ought to have influenced its judgment, it is error which cannot be disregarded as harmless.[218] The giving of an erroneous instruction cannot be assigned as error, unless it was prejudicial to the party complaining.[219] And it is held that a judgment will not be reversed because of error in the form of instructions.[220] So, generally, mere irregularities, resulting in no harm to the appellant, do not warrant a reversal.[221] Mere doubt upon the whole testimony as to the correctness of a decree is not sufficient ground for reversal.[222] A judgment which is right upon the merits should not be reversed by reason of the fact that the court gave a wrong reason for its rendition.[223] But a judgment which is wrong upon any hypothesis must be reversed.[224] And where a cause has been submitted to a jury upon two distinct theories, one of which is erroneous, and it is impossible to determine upon which theory the jury acted, the judgment must be reversed.[225] So a judgment based upon constructive service alone, though rendered after jurisdiction is acquired, may nevertheless be reversed for error, if rendered before the legal time for answering expired.[226] So, a judgment shown by the record to be void will be reversed on appeal, though neither party raises the question.[227]

Cleary, 3 N. Dak. 270, 55 N. W. 729; Smith v. Northern Pacific R. R. Co., 3 N. Dak. 555, 58 N. W. 345.

215 State v. Lurch, 12 Or. 99, 6 Pac. 408.

216 Haugen v. Chicago etc. Ry. Co., 3 S. Dak. 394, 53 N. W. 769. See Krewson v. Purdom, 15 Or. 589, 16 Pac. 480; Hammond v. Bovee, 4 Colo. App. 269, 35 Pac. 674.

217 Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

218 Wilson v. Morris, 4 Colo. App. 242, 36 Pac. 248.

219 Fugate v. Smith, 4 Colo. App. 201, 35 Pac. 283; Buckey v. Phenicie, 4 Colo. App. 204, 35 Pac. 277.

220 Perkins v. Marrs, 15 Colo. 262, 25 Pac. 168.

221 Putnam v. Lyon, 3 Colo. App. 144, 32 Pac. 492.

222 Lindsay v. Lindsay, 1 Colo. App. 108, 27 Pac. 877.

223 Groome v. Almstead, 101 Cal. 425, 35 Pac. 1021; Home Ins. Co. v. Atchison etc. R. R. Co., 19 Colo. 46, 34 Pac. 281; Bell v. Cunningham, 81 N. C. 83.

224 Robeson v. Miller, 4 Colo. App. 313, 35 Pac. 880.

225 King v. Post, 12 Colo. 355, 21 Pac. 38.

226 Seeley v. Taylor, 17 Colo. 70, 28 Pac. 461, 723.

227 Miller v. Sunde, 1 N. Dak. 1, 44 N. W. 301; Robinson v. Oceanic etc. Navigation Co., 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636. See Stew-

And where there is no brief on file by the respondent, and the case is not orally argued in his brief, the judgment and order appealed from should be reversed.[228]

§ 1933. Reversal, effect of.—If the judgment is reversed, the parties are remitted to their original rights, and may proceed as though no action had ever been brought.[229] The reversal of a judgment restores any advantage which may have been derived from its rendition.[230] Property purchased by the plaintiff on sale under judgment reversed must be restored;[231] but otherwise as to a stranger, a *bona fide* purchaser without notice.[232] The assignee of a judgment, and of the sheriff's certificate of sale thereunder, stands in the same position as his assignor.[233] The benefits of the reversal of a judgment are limited to the plaintiffs in error alone who complained of the judgment.[234]

§ 1934. When judgment will be reversed and new trial ordered.—A new trial must be ordered whenever it is necessary as a matter of right.[235] So where there are disputed facts to be decided;[236] or where the evidence was opposed to the verdict;[237] or where erroneous instructions have been given;[238] but not where it is apparent that no possible state of proof applicable to the issues can entitle respondent to a judgment.[239] On reversing a case, the appellate court may in its discretion award a new trial.[240] Where nothing appears on the record, either in the

art v. Lohr, 1 Wash. 341, 22 Am. St. Rep. 150, 25 Pac. 457; Pioneer Land Co. v. Maddux, 109 Cal. 633, 50 Am. St. Rep. 67, 42 Pac. 295.

228 Kelly v. Bradbury, 104 Cal. 237, 37 Pac. 872; Davis v. Hart, 103 Cal. 530, 37 Pac. 486; Richter v. Fresno etc. Co., 101 Cal. 582, 36 Pac. 96.

229 Hunt v. Hoboken Land Co., 1 Hilt. 161; Ellert v. Kelly, 4 E. D. Smith, 12, 10 How. Pr. 392. See, as to rights of appellant upon reversal of judgment, Hewitt v. Dean, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93; Cal. Code Civ. Proc., § 957.

230 Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459; Estus v. Baldwin, 9 How. Pr. 80; Sheridan v. Mann, 5 How. Pr. 201.

231 Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

232 Id.

233 Id.

234 New York Life Ins. Co. v. Brown, 32 Colo. 365, 76 Pac. 799.

235 Griffin v. Marquardt, 17 N. Y. 28.

236 Lick v. Diaz, 37 Cal. 437; Polhemus v. Carpenter, 42 Cal. 375.

237 Maine Boys T. Co. v. Boston T. Co., 37 Cal. 40.

238 Slaughter v. Fowler, 44 Cal. 195; McCreery v. Everding, 44 Cal. 246.

239 Edmondston v. McLoud, 16 N. Y. 543; Marquat v. Marquat, 12 N. Y. 336.

240 Griffin v. Marquardt, 17 N. Y. 28; Astor v. L'Amoreux, 8 N. Y. 107;

pleadings, evidence, or judgment, from which the court can ascertain the rights of the parties, and where it is highly probable that the judgment of the court below is founded neither upon law nor equity, the case may be remanded for new trial.[241] On review of error on the trial, in the process of ascertaining the facts, the proper judgment on reversal will be one ordering a new trial.[242] An unqualified reversal of a judgment by the supreme court has the effect to remand the cause for a new trial.[243] Under section 450 of the Washington code of 1881, the supreme court may review and reverse on appeal any judgment of the superior court, although no motion for a new trial was made in such court.[244] Where proper, an absolute reversal may be ordered as to some and a new trial awarded as to others of the appellants.[245] The appellate court may add to the judgment of reversal that the cause be tried *de novo*, or that a particular issue be tried.[246] The court below may be allowed to enter judgment for plaintiff for the amount of the verdict, or otherwise to retry the cause.[247] An order for a new trial is not "equivalent to a new action."[248] Where judgment is reversed and a new trial granted, the case goes back for trial on all the issues of fact raised by the pleadings,[249] the parties having the same right which they originally had.[250] But a new trial will not be awarded for an error by which the rights of the party were not prejudiced,[251] nor where it is clearly seen that after

Marquat v. Marquat, 12 N. Y. 336; Moffet v. Sackett, 18 N. Y. 522; Schenck v. Dart, 22 N. Y. 420.

241 Reed v. Jourdain, 1 Cal. 101.

242 Marquat v. Marquat, 12 N. Y. 336; Astor v. L'Amoreux, 8 N. Y. 107; Edmonston v. McLoud, 16 N. Y. 543; Griffin v. Marquardt, 17 N. Y. 28; Meyer v. City of Louisville, 26 Barb. 609; Cobb v. Cornish, 16 N. Y. 602; Irwin v. Lawrence, 1 Hilt. 352; Moffet v. Sackett, 18 N. Y. 522.

243 Faulkner v. Hendy, 107 Cal. 49, 40 Pac. 21, 386. As to reversal and new trial where the verdict is against evidence, see Helfrich v. Ogden City Ry. Co., 7 Utah, 186, 26 Pac. 295.

244 Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071. As to reversal of order refusing new trial, see United States v. Brown, 6 Utah, 115, 21 Pac. 461. As to dismissal of action on reversal of judgment, see Bernhard v. Reeves, 6 Wash. 424, 33 Pac. 873. As to remand of cause on reversal for correction of error, see Ohio Creek Coal Co. v. Hinds, 15 Colo. 173, 25 Pac. 502.

245 Williams v. Christie, 4 Duer, 29.

246 Argenti v. San Francisco, 30 Cal. 458.

247 Reniff v. The Cynthia, 18 Cal. 669.

248 United States v. Hawkins, 1 Pet. 125, 7 L. Ed. 80.

249 Hidden v. Jordan, 28 Cal. 301.

250 Stearns v. Aguirre, 7 Cal. 443; Argenti v. San Francisco, 30 Cal. 458; Phelan v. San Francisco, 9 Cal. 15.

251 Kilburn v. Ritchie, 2 Cal. 148, 56 Am. Dec. 326; Tyler v. Green, 28 Cal. 406, 87 Am. Dec. 130; Carpentier v. Gardiner, 29 Cal. 160.

perhaps a protracted litigation the result must be the same.[252] New trial will not be granted to enable a plaintiff to put on proof which he refused to produce at the trial, and the allegations thus not proven will be considered as waived.[253]

§ 1935. Defective pleading.—Where on appeal the complaint is so radically defective as not to authorize the judgment, a new trial may be granted, with leave to plaintiff to amend.[254] The supreme court, after reversing judgment by default, some of the items of the complaint being illegal, may remand the cause, with liberty to the defendant to set up a defense.[255]

§ 1936. Findings.—Where the findings of the court are clearly not warranted by the evidence, a new trial should be granted.[256] And where the judgment, entered correctly, followed the findings, which were erroneous and not supported by the evidence, the appellate court, on reversal, cannot enter judgment for the opposite party, but can only remand the case for a new trial.[257] Where the testimony is all one way, and the finding is contrary to the evidence, a new trial will be granted;[258] or if the evidence was such that if the question had been submitted to a jury the court would set aside the verdict as contrary to the evidence.[259] A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence was insufficient to justify his decision.[260] A finding of the lower court will not be reversed on appeal unless there is a substantial failure of proof to support it.[261] If the questions presented for review are only those of fact, and there is evidence to support the finding, the judgment will not be disturbed.[262]

252 Tohler v. Folsom, 1 Cal. 213; Sunol v. Hepburn, 2 Cal. 285; Smith v. Compton, 6 Cal. 26.

253 St. Louis etc. R. Co. v. McGivney, 19 Okla. 361, 91 Pac. 693.

254 Sterling v. Hanson, 1 Cal. 479.

255 People v. Hager, 19 Cal. 462.

256 Bolton v. Stewart, 29 Cal. 615. See, also, Buttz v. Colton, 6 Dak. 306, 43 N. W. 717; Bowman v. Ayers, 2 Idaho, 305, 13 Pac. 346; Beamer v. Freeman, 84 Cal. 554, 24 Pac. 169; Oakland Pav. Co. v. Bagge, 79 Cal. 439, 21 Pac. 855.

257 Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

258 Lyle v. Rollins, 25 Cal. 440.

259 Moore v. Murdock, 26 Cal. 514.

260 Cappe v. Brizzolara, 19 Cal. 607.

261 Washington etc. Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. 115. See Charles v. Varian, 4 Colo. App. 227, 35 Pac. 672.

262 McKenzie v. Hallack Paint etc. Co., 4 Colo. App. 156, 35 Pac. 198. When failure merely to make findings on certain issues is not ground for reversal, see Dedmon v. Moffitt, 89 Cal. 211, 26 Pac. 800.

§ 1937. **In injunction.**—In a case of injunction and damages, where the injunction, but not the damages, was allowed, and both parties appeal, the one from the injunction and the other from the order refusing damages, the court will remand the cause for trial *de novo,* on the question of damages.[263]

§ 1938. **Newly discovered evidence.**—Where the record does not contain the evidence given on the trial, the supreme court will not hold the refusal of a new trial on account of newly discovered evidence to be error, as it cannot know how far the new evidence is merely cumulative.[264] The determination of the effect of newly discovered evidence which is cumulative is peculiarly within the province of the trial court.[265]

§ 1939. **State of excitement.**—Where it is manifest that the verdict was given under a state of great excitement, and the court below had refused a new trial, the appellate court will reverse the judgment and order a new trial.[266]

§ 1940. **Uncertainty of law.**—Where the merits of the case were not investigated in the lower court, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act in regard to interventions, a new trial was granted.[267]

§ 1941. **Wrong construction.**—Where the complaint, evidence as admitted, verdict, and judgment are all in harmony, but the judgment is erroneous, from a wrong construction given to the description of land in a deed in evidence, the supreme court cannot modify the judgment, but a new trial will be granted.[268]

§ 1942. **Decisions on appeal.**—A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former, being entered on record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, until it is transcribed on the record

263 Jungerman v. Bovee, 19 Cal. 355.

264 Cowden v. Wade, 23 Ind. 471.

265 Hubbell Oil Co. v. Morrison, 7 Cal. App. 457, 94 Pac. 589.

266 People v. Acosta, 10 Cal. 195.

267 Speyer v. Ihmels, 21 Cal. 280, 81 Am. Dec. 157.

268 Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

with the consent of the writer, when it ceases to be the subject of change, except through regular proceedings before the court by petition. The legislature cannot require the supreme court to give the reasons of its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decision.[269]

§ 1943. **Rehearing.**—When judgment has been pronounced in the appellate court, and before the *remittitur* has been sent, a rehearing may be granted.[270] But after an order had been made granting a rehearing, the filing of the *remittitur* in the court below does not take away the jurisdiction to hear the cause.[271] Where the judgment is rendered by the supreme court in its original jurisdiction, on an application in *mandamus*, an application for a rehearing will not be entertained, unless a motion for a new trial is made, as in cases arising in the district courts.[272]

Where the supreme court has exercised its discretion on a motion to recall a mandate by entering a final decree, after affirmance of the decree and overruling a petition for a rehearing, an *alias* motion to recall the mandate will not lie.[273]

§ 1944. **Motion to amend.**—A motion to amend the judgment of the supreme court must be made within the time allowed for filing a petition for rehearing.[274] A material modification should not be made on such a motion; rehearing should be first granted.[275] After the appellant has rested his case on certain points of the record, he will not be granted a rehearing upon an amended record.[276] A judgment of affirmance, for failure of the appellant to appear, will be set aside on a rehearing, where actual notice of argument was not given.[277]

§ 1945. **Points.**—On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument.[278]

269 Houston v. Williams, 13 Cal. 24, 73 Am. Dec. 565.

270 Cal Sup. Ct. rule 30; Grogan v. Ruckle, 1 Cal. 193; Ruse v. Mutual Life Ins. Co., 24 N. Y. 653; Hoyt v. Thompson's Exr., 19 N. Y. 207; Durkee v. Garvey, 84 Cal. 590, 24 Pac. 929.

271 Grogan v. Ruckle, 1 Cal. 193.

272 People v. Coon, 25 Cal. 635.

273 McLeod v. Lloyd, 45 Or. 67, 75 Pac. 702.

274 Gray v. Palmer, 11 Cal. 341.

275 Clark v. Boyreau, 14 Cal. 634; Argenti v. San Francisco, 30 Cal. 458. As to modification of judgment and denial of rehearing, see Winter v. Fulstone, 20 Nev. 261, 21 Pac. 201, 687.

276 Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029.

277 Lightstone v. Laurencel, 2 Cal. 106.

278 Grogan v. Ruckle, 1 Cal. 193. See Atherton v. Supervisors of San

§ 1946. **Practice on rehearing.**—The petition filed must include all grounds on which the rehearing is claimed; those not included are deemed waived.[279] The employment of new counsel after decision rendered is no ground for an extension of time for filing a petition for rehearing.[280] Where respondent filed a petition for the modification of a final judgment, it was held to be a petition for a rehearing.[281] Under section 1439 of the Washington code of procedure, the applicant for rehearing is not entitled to argue his application orally before the court.[282] Oral argument may be deemed abandoned on petition for rehearing.[283] A petition for rehearing is a pleading, and should not be an argument.[284] A rehearing will not be granted in the supreme court of Utah unless the court failed to consider some material point in the case, or erred in its conclusions, or some material matter has been discovered which was unknown when the case was argued.[285] Where the *remittitur* has been sent to and filed in the court from which the appeal was taken, without fraud or mistake, the supreme court has no jurisdiction to grant a rehearing.[286] A petition for a rehearing in the supreme court of California cannot be made in a case of *habeas corpus*.[287] And when a case has been heard and decided by the supreme court in department, and afterwards by the court in bank, the right to petition for a rehearing in bank will not be recognized.[288]

§ 1947. **Rehearing—When granted.**—A rehearing should be granted only in those cases where reasonably good grounds exist therefor, and these should appear on the face of the petition.[289]

Mateo County, 48 Cal. 160; Mount v. Mitchell, 32 N. Y. 702; Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677, 12 L. R. A. 104; People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129; San Francisco v. Pacific Bank, 89 Cal. 23, 26 Pac. 615, 835; McDonald v. People, 29 Colo. 503, 69 Pac. 703

279 Willson v. Broder, 24 Cal. 190.

280 Ferris v. Coover, 10 Cal. 589. See, also, Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640.

281 Gray v. Gray, 11 Cal. 341; Rhea v. Surrhyne, 39 Cal. 581.

282 Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

283 Marshall Silver Min. Co. v. Kirtley, 12 Colo. 410, 21 Pac. 492.

284 Enright v. Grant, 5 Utah, 400, 16 Pac. 595.

285 In re McKnight, 4 Utah, 237, 9 Pac. 299. As to petition for rehearing under South Dakota practice, see Wright v. Sherman, 3 S. Dak. 367, 53 N. W. 425.

286 Wallace v. Stutsman County, 6 Dak. 1, 50 N. W. 832.

287 Ex parte Robinson, 71 Cal. 608, 12 Pac. 794.

288 Hegard v. California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359. See Durgin v. Neal, 82 Cal. 595, 23 Pac. 133.

289 Collins v. Metropolitan Life

When no copy of appellant's briefs was served upon respondent, and the court decides the case against him without any brief on his part, a rehearing will be granted on application.[290] The power of the supreme court of California to grant rehearings by orders of the court entered upon its minutes, without the written signatures of five justices, must be affirmed upon the principle of *stare decisis*.[291]

§ 1948. **When not granted.**—When there was a conflict of evidence, plaintiff and defendant being the only witnesses in the court below on which the verdict and judgment were rendered, motion for rehearing was denied.[292] An equal division of the justices of the supreme court upon the question of granting a rehearing is a denial thereof.[293]

§ 1949. **Subsequent appeals.**—The decision on questions directly involved and considered on appeal is the law of the case on a second appeal.[294] The supreme court is at liberty in an independent case to depart from a rule which it may have announced in a prior case that it afterwards determines unsound or unwise to follow; but a conclusion once reached is the law of the case in which it is announced.[295] A finding by the trial court that, in view of the additional evidence offered, it did not feel called upon to follow the decision of the appellate court, but would again hold that no sale was proven, being in contravention of the appellate court's holding, can have no weight with the supreme court on a later appeal.[296] The doctrine of "law of the case" extends only to the questions presented and distinctly passed upon on the former appeal.[297] Questions which the court refused to consider

Ins. Co., 32 Mont. 329, 108 Am. St. Rep. 578, 80 Pac. 609, 1092.

290 Patterson v. Ely, 19 Cal. 28.

291 In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

292 Fisher v. Merwin, 25 How. Pr. 284.

293 Ayres v. Bensley, 32 Cal. 632.

294 Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918; Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405; Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546; Hall v. Blackman, 9 Idaho, 555, 75 Pac. 608; Gila Valley etc. Ry. Co. v. Lyon, 9 Ariz. 218, 80 Pac. 337; Raymond v. Glover, 144 Cal. 548, 78 Pac. 3; Limberg v. Glenwood Lumber Co., 145 Cal. 255, 78 Pac. 728; Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078; Commissioners of Rio Grande County v. Phye, 31 Colo. 176, 71 Pac. 1108; Branner v. Webb, 65 Kan. 857, 68 Pac. 1107.

295 Hall v. Blackman, 9 Idaho, 555, 75 Pac. 608.

296 Hendrie & Bolthoff Mfg. Co. v. Collins, 29 Colo. 102, 67 Pac. 164.

297 Hunter v. Porter, 10 Idaho, 72, 77 Pac. 434; Herriman Irr. Co. v. Keel, 25 Utah, 96, 69 Pac. 719.

on the former appeal may be considered.[298] Language used by the supreme court in its opinion on a former appeal which was not necessary to the decision, and was mere *dictum*, is not the law of the case.[299] A party appealing from a judgment is estopped from afterwards asserting, on a subsequent appeal, the incorrectness of the decision rendered.[300]

Where on appeal from the first trial copies of tax-deeds were taken as evidence that delinquent lists were prepared, such copies and the presumptions arising therefrom must be allowed to establish the originals on second trial.[301] The construction of a stipulation on first appeal becomes the law of the case.[302]

298 Gray v. Washington Water Power Co., 30 Wash. 154, 70 Pac. 255.

299 Yank v. Bordeaux, 29 Mont. 74, 74 Pac. 77.

300 Reynolds v. Fitzpatrick, 28 Mont. 170, 72 Pac. 510.

301 Davis v. Pacific Imp. Co., 7 Cal. App. 452, 94 Pac. 595.

302 Ryan v. Rogers, 14 Idaho, 309, 94 Pac. 427; Canady v. Knox, 48 Wash. 685, 94 Pac. 652.

CHAPTER LXX.

REMITTITUR.

§ 1950. In general.—The cause having been finally disposed of in the highest court in the state, a *remittitur* is sent down instructing the court below as to the nature of such decision, and judgment is entered accordingly; and if the judgment be for a specified amount, the lower court cannot add interest;[1] or if a new trial is ordered, the cause again takes its place upon the superior court calendar; or if the judgment is ordered modified, an order is entered in the court below showing the nature of the modification, and it then becomes and is a final judgment. Where the appellate court reverses the judgment of the court below, and directs the entry of a final judgment, such entry of judgment on *remittitur* can be made in vacation, the act of the clerk in entering being merely ministerial.[2] When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket against the original entry. If on reversal of a cause there is no matter of fact to be ascertained or damages to be assessed, and the matter to be decreed is certain, judgment will be rendered by the appellate court.[3] In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal.[4] If it award a new trial, the clerk will place the cause on the calendar.[5] In New York, it would seem, the practice is different; there the matter should be presented to the court on motion, and a suitable order applied for.[6]

1 German-American St. Bank v. Sullivan, 50 Wash. 42, 96 Pac. 522.

2 McMillan v. Richards, 12 Cal. 467; Dale v. Rosevelt, 1 Wend. 25.

3 Walton v. McKinney (Ariz.), 94 Pac. 1122.

4 Cal. Code Civ. Proc., § 958.

5 Marysville v. Buchanan, 3 Cal. 212.

6 Chautauqua Co. Bank v. White, 23 N. Y. 347; Seacord v. Morgan, 17 How. Pr. 394, 4 Abb. Pr. (N. S.) 249.

When the *remittitur* has been duly and regularly issued from the supreme court, and filed in the court below, the supreme court loses all jurisdiction over the case,[7] except in cases of the dismissal of an appeal obtained by fraud.[8] A *remittitur* issued by mistake may be recalled;[9] so where it is improperly issued from other causes.[10] But a motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the court cannot be entertained after the *remittitur* has been filed below.[11] But the appellate court does not lose its jurisdiction while the order of dismissal is retained in counsel's hands,[12] nor until it is filed in the court below;[13] but may modify it while *in transitu*.[14] Where the *remittitur* was irregular, by default taken contrary to stipulation, the court recalled the papers.[15] A *remittitur* is proper whenever any order is made which finally disposes of the appeal, though it may not be an order on the merits.[16] If there was error as to one separate item in the admission of evidence, plaintiff may be allowed to file a *remittitur* to the amount of such item, and have judgment affirmed.[17]

§ 1951. **Mandate or remittitur.**—A motion made on the twenty-seventh day of December to recall a *remittitur* sent down from the supreme court on the second day of November is made with due diligence.[18] A memorandum of costs filed three days after the filing of the *remittitur* is filed in due time.[19] The decision of the supreme court on appeal is the law of the case on a subsequent trial.[20]

But see Judson v. Gray, 17 How. Pr. 289.

7 Blanc v. Bowman, 22 Cal. 23; Leese v. Clark, 20 Cal. 387; Latson v. Wallace, 9 How. Pr. 334; Legg v. Overbagh, 4 Wend. 188, 21 Am. Dec. 115; Delaplaine v. Bergen, 7 Hill, 591; Dresser v. Brooks, 2 N. Y. 559; Martin v. Wilson, 1 N. Y. 240; Frazer v. Western, 3 How. Pr. 235.

8 Rowland v. Kreyenhagen, 24 Cal. 52. See, also, Estate of Levinson, 108 Cal. 450, 41 Pac. 483, 42 Pac. 479; People v. McDermott, 97 Cal. 247, 32 Pac. 7; De Baker v. Carillo, 52 Cal. 473; Wallace v. Stutsman Co., 6 Dak. 1, 50 N. W. 832; Herrlich v. McDonald, 83 Cal. 505, 23 Pac. 710; Fenton v. Salt Lake County, 4 Utah, 466, 11 Pac. 611.

9 Vance v. Pena, 36 Cal. 328.

10 Hanson v. McCue, 43 Cal. 178; Bernal v. Wade, 46 Cal. 640.

11 Blanc v. Bowman, 22 Cal. 23.

12 Thompson v. Blanchard, 2 N. Y. 561.

13 Burkle v. Luce, 1 N. Y. 239.

14 Hosack v. Rogers, 7 Paige, 108.

15 Chamberlain v. Fitch, 2 Cow. 243; Newton v. Harris, 8 Barb. 306.

16 Dresser v. Brooks, 2 N. Y. 559.

17 Greve v. Echo Oil Co., 8 Cal. App. 275, 96 Pac. 904.

18 Port Angeles Pac. R. Co. v. Cooke, 38 Wash. 184, 80 Pac. 305.

19 Mabb v. Stewart, 143 Cal. xviii, 77 Pac. 402.

20 Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235; Snyder v. Jack, 140 Cal. 584, 74 Pac. 139, 355; Senior

While the trial court, on the remand of a case, must render obedience to the mandate of the supreme court, such obedience only requires an intelligent compliance therewith, and an order not strictly following the terms of the mandate, though erroneous, is not void.[21] Where a judgment has been reversed, and the cause remanded for a new trial, amendment to the pleadings is in the sound discretion of the court.[22] Under the code, allowing amendments when necessary for the furtherance of justice, at any stage of the proceedings, an amendment to an answer may be allowed after appeal and remand for a new trial.[23]

If a trial *de novo* is had in the supreme court, all the evidence being before it, a decree of foreclosure may be entered in such supreme court, though the one made in the lower court was void.[24]

§ 1952. Amendment of pleadings after remittitur.—An order remanding a case for further proceedings according to the opinion does not preclude the parties from amending the pleadings or from trying any issues made by the pleadings as amended.[25] A plaintiff in ejectment is not entitled to have the cause remanded to enable him to set off against certain credits allowed defendant the rents and profits accruing pending appeal.[26]

Where the question of amendment of the pleadings was not before the supreme court, the trial court may allow such amendments upon new trial being ordered.[27] Usually, upon new trial being ordered, amendments to the pleadings are within the sound discretion of the trial court.[28] But it may be amended by motion

v. Anderson, 138 Cal. 716, 72 Pac. 349; Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Board of Public Works v. Denver Tel. Co., 16 Colo. App. 505, 66 Pac. 676; Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632; Boston & M. Cons. Copper etc. Min. Co. v. Montana Ore Purchasing Co., 27 Mont. 431, 71 Pac. 471; Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523; Brooks v. Western Union Tel. Co., 28 Utah, 21, 76 Pac. 881; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377.

21 People v. Carpenter, 29 Colo. 365, 68 Pac. 221.

22 Parke v. Boulware, 9 Idaho, 225, 73 Pac. 19; People v. District Court, 32 Colo. 166, 75 Pac. 390; Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114; Male v. Schaut, 41 Or. 425, 69 Pac. 137; McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

23 Jones v. Western Mfg. Co., 32 Wash. 375, 73 Pac. 359.

24 Waymire v. Shipley (Or.), 97 Pac. 807.

25 Gazos Creek Mill etc. Co. v. Coburn, 8 Cal. App. 150, 96 Pac. 359.

26 Lines v. Digges, 43 Colo. 166, 95 Pac. 341.

27 People v. District Court, 32 Colo. 166, 75 Pac. 390.

28 Parke v. Boulware, 9 Idaho, 225, 73 Pac. 19; Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114; Male v. Schaut, 41 Or. 425, 69 Pac. 137; McLeod v. Lloyd, 43 Or. 260, 71 Pac.

in the court above in respect to a clear inaccuracy, as of miscalculation, etc.;[29] or proceedings may be stayed by the court below on suggestion from the court above, but not otherwise;[30] or the *remittitur* might be vacated by the appellate court if irregularly entered, or entered upon false affidavits.[31]

§ 1953. **Costs.**—On a total affirmance or reversal, the costs follow the decision, and the prevailing party is entitled to them.[32] But when a new trial is ordered, or the judgment modified, the costs of appeal are in the discretion of the court.[33] The words "with costs" added to the judgment, and annexing to the *remittitur* a copy of the bill of costs, are a sufficient awarding of costs.[34] The clerk of the superior court may thereupon issue execution for costs and damages.[35] The court has power of awarding, in addition to the costs upon affirmance, a further sum for damages caused by the delay.[36] The *remittitur* may order costs of appeal to abide the event of a new trial,[37] or appellants, on the main question—to-wit, the injunction—may be required to pay the costs in the upper court on both appeals.[38] A memorandum of costs filed three days after the filing of the *remittitur* is filed in due time.[39]

It must be presumed that all questions respecting the amount of costs were litigated on an appeal from a judgment for costs.[40]

795, 74 Pac. 491; McFarlane v. McFarlane, 45 Or. 360, 77 Pac. 837; Jones v. Western Mfg. Co., 32 Wash. 375, 73 Pac. 359.

29 Palmer v. Lawrence, 5 N. Y. 455; Griswold v. Haven, 26 How. Pr. 170.

30 Jarvis v. Shaw, 16 Abb. Pr. 415; Selden v. Vermilya, 3 Sandf. 683; Bogardus v. Rosendale Mfg. Co., 1 Duer, 592.

31 Newton v. Harris, 8 Barb. 306.

32 White v. Anthony, 23 N. Y. 164.

33 Cal. Code Civ. Proc., § 1027.

34 Marysville v. Buchanan, 3 Cal. 212.

35 Id.; affirmed in McMillan v. Vischer, 14 Cal. 232; Ex parte Burrill, 24 Cal. 350.

36 Cal. Code Civ. Proc., § 957; Dreyfuss v. Giles, 79 Cal. 409, 21 Pac. 840; Lemon v. Rucker, 80 Cal. 609, 22 Pac. 471; Whitby v. Rowell, 82 Cal. 635, 23 Pac. 195; Ramsey v. Cortland Cattle Co., 6 Mont. 498, 13 Pac. 247; Dold v. Robertson, 3 N. Mex. 313 (520), 9 Pac. 302; Hawkins v. Jones, 21 Or. 502, 28 Pac. 548. As to right of appellee to damages on failure of appellant to file transcript, see Shafer v. Second Nat. Bank, 4 N. Mex. 141 (292), 13 Pac. 179. Compare Lester v. Elwert, 25 Or. 102, 35 Pac. 29.

37 Marsh v. Benson, 34 N. Y. 358.

38 Jungerman v. Bovee, 19 Cal. 355.

39 Mabb v. Stewart, 143 Cal. xviii, 77 Pac. 407.

40 Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875; Bell v. Thompson, 8 Cal. App. 483, 97 Pac. 158.

§ 1954. Law of the case.—A decision of the supreme court in a case becomes the law of that case in all its future stages,[41] whether the decision be erroneous or not;[42] and if the same questions are the only ones presented on a subsequent appeal it will be dismissed.[43] Such judgment cannot on a second appeal be altered or changed, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable.[44] But this rule does not apply to points not made or passed upon on the former appeal, nor to new points upon the second appeal, nor to questions of fact.[45] The rule of the law of the case has no application to questions of fact, and nothing said in the opinion on a former appeal as to the facts can bind the trial court upon a second trial or be conclusive upon a second appeal.[46] Where there is an intervention in ejectment, and judgment for the plaintiff against both defendant and the intervener, each of whom take a separate appeal from the judgment and order denying a new

41 Davidson v. Dallas, 15 Cal. 75; Hubbard v. Sullivan, 18 Cal. 508; Nieto v. Carpenter, 21 Cal. 455; Table Mountain Tunnel Co. v. Stranahan, 21 Cal. 548; Moore v. Murdock, 26 Cal. 524; Lucas v. San Francisco, 28 Cal. 591; Kile v. Tubbs, 32 Cal. 332; Argenti v. Sawyer, 32 Cal. 414; Sullivan v. Seattle El. Co., 51 Wash. 71, 97 Pac. 1109.

42 Davidson v. Dallas, 15 Cal. 75; Gunter v. Laffan, 7 Cal. 588; Clary v. Hoagland, 6 Cal. 685; Snyder v. Jack, 140 Cal. 584, 74 Pac. 139, 355; Kent v. Williams, 146 Cal. 3, 79 Pac. 527; Brooks v. Western Union Tel. Co., 28 Utah, 21, 76 Pac. 881; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377.

43 Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 Pac. 1031.

44 Estate of Pacheco, 29 Cal. 224; Mitchell v. Davis, 23 Cal. 381. To same effect, consult the following decisions: Thompson v. White, 76 Cal. 381, 18 Pac. 399; Stanton v. French, 91 Cal. 274, 25 Am. St. Rep. 174, 27 Pac. 657; Emeric v. Alvarado, 90 Cal. 444, 27 Pac. 356; Klauber v. San Diego Street-Car Co., 98 Cal. 105, 32 Pac. 876; Mills v. Home Benefit Life Assoc., 105 Cal. 232, 38 Pac. 723; Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Mahan v. Wood, 105 Cal. 12, 38 Pac. 507; Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Krumdick v. White, 107 Cal. 37, 39 Pac. 1066; Israel v. Arthur, 18 Colo. 158, 32 Pac. 68; Palmer v. Murray, 8 Mont. 174, 19 Pac. 553; Kelley v. The Cable Co., 8 Mont. 440, 20 Pac. 669; Davenport v. Kleinschmidt, 8 Mont. 467, 20 Pac. 823; Plymouth County Bank v. Gilman, 3 S. Dak. 170, 44 Am. St. Rep. 782, 52 N. W. 869; Venard v. Green, 4 Utah, 456, 11 Pac. 337; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Powell v. Dayton etc. R. R. Co., 14 Or. 22, 12 Pac. 83; Thompson v. Hawley, 16 Or. 251, 19 Pac. 84; Kane v. Rippey, 22 Or. 299, 29 Pac. 1005.

45 People v. Hamilton, 103 Cal. 488, 37 Pac. 627; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200; Johnson v. Bailey, 17 Colo. 59, 28 Pac. 81; Bloomfield v. Buchanan, 14 Or. 181, 12 Pac. 238.

46 Heidt v. Minor, 113 Cal. 385, 45 Pac. 700; Benson v. Shotwell, 103 Cal. 163, 37 Pac. 147; Cross v. Zellerbach, 63 Cal. 623; and cases cited above.

trial, the affirmance of the judgment and order on the appeal of the defendant does not preclude the supreme court from afterwards reversing both on the appeal by the intervener, and ordering judgment in his favor.[47] And such decision is conclusive on the rights of the parties, and is not subject to revision;[48] and is a final adjudication from which the court cannot depart nor the parties relieve themselves.[49] The discussion and determination of other points not tending to the decision of the point upon which the appeal was disposed of must be regarded as *dicta*, and not as the law of the case.[50] If the appellate judges cannot agree, their decision should not become the law of the case upon retrial.[51] The doctrine of the law of the case applies equally to actions of ejectment as to other actions, and without consideration as to the importance of the questions involved.[52] Where an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the court will not apply to any new state of facts which may appear on the record, or to an appeal from the final judgment.[53] A finding as to the quantity of water used by defendant is binding in a subsequent trial, with the same evidence.[54]

§ 1955. **Proceedings after remand.**—Where the supreme court, on reversing a decree, did not prescribe the mode of modifying the original decree, the trial court might, in its discretion, vacate the original decree, and enter a new one embodying the whole matter.[54a] Where a cause has been tried, reversed on appeal, and remanded for a new trial, no new note of issue was required in order to place the same regularly on the calendar for new trial.[55] When a *remittitur* after affirmance had been filed with the clerk in whose office the judgment-roll was filed, the stay of execution

47 Donner v. Palmer, 45 Cal. 180.

48 Dewey v. Gray, 2 Cal. 374; Soule v. Ritter, 20 Cal. 522; Leese v. Clark, 20 Cal. 387.

49 Phelan v. San Francisco, 20 Cal. 39; Lucas v. San Francisco, 28 Cal. 591.

50 Mulford v. Estudillo, 32 Cal. 131; Wixson v. Devine, 80 Cal. 385, 22 Pac. 224. Compare Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. 212; San Francisco v. Spring Valley Water Works, 53 Cal. 608.

51 Larsen v. Leonardt, 8 Cal. App. 226, 96 Pac. 395.

52 Leese v. Clark, 20 Cal. 387.

53 Trinity County v. McCammon, 25 Cal. 119; Conway v. Supreme Council Catholic Knights, 137 Cal. 384, 70 Pac. 223.

54 Senior v. Anderson, 138 Cal. 716, 72 Pac. 349.

54a Downing v. Rademacher, 138 Cal. 324, 71 Pac. 343; Bemmerly v. Woodard, 136 Cal. 326, 68 Pac. 1017; Bogart v. Amanda Cons. Gold Min. Co., 32 Colo. 32, 74 Pac. 882.

55 Spokane etc. Gold & Copper Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

pending appeal became nugatory, and the jurisdiction of the superior court reattached, so as to reauthorize the enforcement of the decree, notwithstanding the clerk failed to make the entries required by such section.[56] Where a writ of error, issued out of the supreme court of the United States to the supreme court of the state, was dismissed, and the mandate of the federal court remanding the cause was filed in the state court, an order to vacate the stay of proceedings consequent on the issuance of the writ was unnecessary.[57]

When a case is reversed, and a new trial ordered, without any restrictions or limitations, the parties are entitled to a retrial on all the issues.[58] If the upper court decides plaintiff cannot sue, the trial court, after remand, properly dismisses the case.[59] The amount of damages being severable, a new trial will not be allowed for error, if such damages be remitted, or the new trial may be granted conditionally.[60]

§ 1956. Proceedings subsequent—Continued.—While the trial court, on the remand of a case, must render obedience to the mandate of the appellate court, such obedience only requires an intelligent compliance therewith; and an order not strictly following the terms of the mandate, though erroneous, is not void.[61] If the supreme court directs the judgment of the court below to be modified, the court below cannot open it so as to change it in any particular than as directed;[62] nor can the court below refuse to give effect to the judgment of the appellate court.[63] So, also, in case of reversal by the supreme court of the United States; and if the mandate is filed in the court below its judgment is reversed, even if the lower court denies a motion to make its judgment conform to that of the United States supreme court.[64] The court below has no authority to prevent the immediate execution of the judgment so remitted.[65] Nor has the lower court

56 Granger v. Sheriff, 140 Cal. 190, 73 Pac. 816.

57 Galvin v. Palmer, 134 Cal. 426, 66 Pac. 572.

58 Corporation of Members of Church of Jesus Christ of Latter Day Saints v. Watson, 27 Utah, 538, 76 Pac. 706.

59 Olympia Min. Co. v. Kerns, 15 Idaho, 371, 97 Pac. 1031.

60 Eaton v. Blackburn (Or.), 97 Pac. 539; Choctaw etc. Co. v. Burgess, 21 Okla. 653, 97 Pac. 271.

61 People v. Carpenter, 29 Colo. 365; 68 Pac. 221.

62 Meyer v. Kohn, 33 Cal. 484.

63 McMillan v. Richards, 12 Cal. 467.

64 Reynolds v. Hosmer, 45 Cal. 616.

65 Marysville v. Buchanan, 3 Cal. 212; McMillan v. Richards, 12 Cal. 467.

the power to modify the judgment so remitted.[66] If a cause has been reversed upon appeal and sent back for retrial, the failure of the lower court to comply with the directions for retrial is ground of error.[67]

§ 1957. Restitution.—When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment on the appeal from which the proceedings were not stayed.[68] Where final judgment is rendered for appellant, the court should exercise the power of restitution.[69] The power of restitution existing in the supreme court does not exclude the lower courts from exercising the same power.[70] This does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner that its title is not changed; as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like.[71] A motion for restitution should be made before the entry of judgment, of which it then becomes a part.[72]

§ 1958. Stay of proceedings.—The presiding judge of the highest court in a state has no power to grant a stay of proceedings on a judgment rendered in that court until an application can be made to some justice of the supreme court of the United States to issue citation on a writ of error.[73]

66 Argenti v. San Francisco, 30 Cal. 458; Rogers v. Paterson, 4 Paige, 409; Griswold v. Havens, 16 Abb. Pr. 413; Quackenbush v. Leonard, 10 Paige, 131; McGregor v. Buell, 17 Abb. Pr. 31. See, also, State v. Superior Court, 7 Wash. 234, 34 Pac. 930. Compare Spinning v. Drake, 7 Wash. 1, 34 Pac. 212.

67 Tacoma Building Assoc. v. Clark, 8 Wash. 289, 36 Pac. 135.

68 Cal. Code Civ. Proc., § 957; Polack v. Shafer, 46 Cal. 270; Pico v. Cuyas, 48 Cal. 639. See, also, Raun v. Reynolds, 18 Cal. 276.

69 Estus v. Baldwin, 9 How. Pr. 80. See Britton v. Phillips, 24 How. Pr. 111.

70 Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

71 Farmer v. Rogers, 10 Cal. 335. See Hewitt v. Dean, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93; Spring Valley Water Co. v. Drinkhouse, 95 Cal. 220, 30 Pac. 218; San Diego School Dist. v. Supervisors, 97 Cal. 439, 32 Pac. 517.

72 Kennedy v. O'Brien, 2 E. D. Smith, 41; Lott v. Swezey, 29 Barb. 87.

73 Greely v. Townsend, 25 Cal. 614. As to authority of trial court to stay

§ 1959. Recall of remittitur.—A *remittitur* cannot be recalled on the ground that an alleged adverse party was not made a party to the appeal. Such recall can be made only when the order is a nullity for inadvertence or fraud.[74] Where the supreme court has exercised its discretion on motion to recall a mandate, by refusing it and entering final judgment, an *alias* motion to recall the mandate will not lie.[75] Absence from the city may not be sufficient excuse for not making a motion to recall a *remittitur* in the time allowed.[76]

§ 1960. Jurisdiction of appellate court after remand.—Where a judgment has been reversed and the *remittitur* sent down to the lower court, it cannot be recalled on the ground that an alleged adverse party was not made party to the appeal. Such recall can only be made when the order is a nullity because made inadvertently or obtained by fraud.[77] Where the supreme court has exercised its discretion on a motion to recall a mandate by entering a final decree, after affirmance of the decree, and overruling petition for rehearing, an *alias* motion to recall the mandate will not lie.[78] A petition to recall a mandate which seeks the relief sought by petition for rehearing, which was denied, is properly denied.[79] The supreme court has no power, after the term, to recall the mandate to qualify or modify that which it has once finally determined.[80]

§ 1961. Form of judgment pursuant to remittitur.

Form No. 508.

[TITLE.]

This action having been tried at the . . . term, 19.., of this court, before the court and a jury, and a special verdict having been rendered therein, which is of record [or, if tried by the

proceedings, see Rhodes v. Spencer, 68 Cal. 199, 8 Pac. 855. As to issue of writ of supersedeas for the purpose of staying proceedings in the superior court, see Dulin v. Pacific etc. Coal Co., 98 Cal. 304, 33 Pac. 123.

74 Richardson v. Chicago Packing etc. Co., 135 Cal. 311, 67 Pac. 769.

75 McLeod v. Lloyd, 45 Or. 67, 75 Pac. 702.

76 In re Sanford's Estate, 139 Cal. xix, 73 Pac. 466.

77 Richardson v. Chicago Packing etc. Co., 135 Cal. 311, 67 Pac. 769; In re Sanford's Estate, 139 Cal. xix, 73 Pac. 466.

78 McLeod v. Lloyd, 45 Or. 67, 75 Pac. 702.

79 Eldriedge v. Hoefer (Or.), 96 Pac. 1105.

80 Krause v. Ore Steel Co., 50 Or. 88, 91 Pac. 442, 92 Pac. 810.

court, insert: and the court having made findings of fact and conclusions of law therein, which are of record], and the court having, on the . . . day of . . . , 19.., rendered judgment thereon for the plaintiff, and against the defendant, for . . . dollars damages, and . . . dollars costs; and the defendant having duly appealed from said judgment, and the whole thereof, to the supreme court; by which court the said judgment was, on the . . . day of . . . , 19.., wholly reversed; and the record in this cause having been duly remitted from said supreme court to this court, with directions that judgment be entered in favor of the defendant; and due notice of such remittance having been given to the plaintiff, as appears by the proofs on file; and due notice of application for this judgment having been given, and proof of such notice having been filed:

Now, on motion of G. H., attorney for the defendant,

It is adjudged, that the complaint herein be dismissed, and that C. D., defendant, do have and recover of A. B., plaintiff, the costs and disbursements of this action, taxed at the sum of . . . dollars.

CHAPTER LXXI.

APPEALS FROM JUSTICES' COURTS, AND OTHER JUDICIAL OR QUASI-JUDICIAL SOURCES, TO SUPERIOR COURTS.

§ 1962. When lies.—Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court may appeal therefrom to the superior court.[1] Where the right of review is concurrent with the right of appeal, an appellant who has filed notice of appeal and the undertaking, and secured a stay of proceedings, and certification of the transcript, can abandon the appeal before filing the transcript, and sue out a writ of review.[2] The superior courts have sole appellate jurisdiction in such cases,[3] and such appeals are a bar to the remedy by *certiorari*.[4] Under the constitution, and prior to any act of the legislature relating to appeals from justices' courts, the superior court had jurisdiction of such appeals.[5] But if the time for appeal has elapsed, plaintiff can apply to the superior court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment, so far as questions of jurisdiction are concerned.[6] The constitutional provision limits the exercise of the appellate jurisdiction of the superior court to the extent and mode which the legislature may prescribe. The steps prescribed by statute must be strictly pursued.[7]

§ 1963. Appeal, how taken.—The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party.[8] The notice must state whether the appeal is taken from the whole or a part of the judgment, and, if from

1 Cal. Code Civ. Proc., § 974.

2 Feller v. Feller, 40 Or. 73, 66 Pac. 468.

3 People v. Fowler, 9 Cal. 85; Denmark v. Liening, 10 Cal. 93; Hunter v. Hoole, 17 Cal. 418; Comstock v. Clemens, 19 Cal. 77.

4 Gray v. Schupp, 4 Cal. 185; Coulter v. Stark, 7 Cal. 244; Clary v. Hoagland, 13 Cal. 173; People v. Shepard, 28 Cal. 115.

5 California etc. Co. v. Superior Court, 60 Cal. 305.

6 Comstock v. Clemens, 19 Cal. 77; People v. Johnson, 30 Cal. 98. As to appeals in special statutory cases, see Burson v. Cowles, 25 Cal. 535; People v. Halloway, 26 Cal. 651.

7 Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716. See, also, Steel v. Rees, 13 Or. 428, 11 Pac. 68.

8 Perkins v. Bridge, 10 Idaho, 189, 77 Pac. 329.

a part, what part, and whether the appeal is taken on questions of law or fact, or both.[9] But an appeal is not effectual for any purpose unless an undertaking be filed.[10] A subsequent order refusing to open a default case gives the district court no jurisdiction on appeal.[11] The appeal must be taken within thirty days from the time of determination of the case on its merits, and not from time of retaxation of costs.[12] To effectuate an appeal from the judgment of a justice of the peace, there must be a notice of appeal, a service of it on the adverse party, and the filing of it and of an undertaking for costs with the justice; and all of these acts must be done within the time prescribed by the statute for taking the appeal.[13]

§ 1964. Costs.—One of the conditions upon which an appeal is allowed from justices' courts is the payment of the costs of the action.[14] An offer to pay costs as soon as the papers are made out is not a sufficient tender. The justice is not bound to first make out the papers, and then rely on his fees being paid;[15] but may do so if he so elect; and he must make a demand for his fees;[16] but if he send up his case without receiving his fees, that in itself is not a ground for dismissing the appeal.[17] A return to an alternative *mandamus* to compel a justice to send up papers on appeal, that his fees had not been paid or tendered "prior to the service of the writ," is no defense to making the writ peremptory, as they may have been paid since.[18]

§ 1965. Taxation of costs.—The taxation of costs does not become a judicial act or decision subject to review until the justice has adjudicated the matter upon motion for retaxation of costs;[19] and appeal therefrom may be more than thirty days after rendition of the original judgment.[20]

9 Cal. Code Civ. Proc., § 974.

10 Cal. Code Civ. Proc., § 978.

11 State v. District Court, 30 Mont. 93, 75 Pac. 862.

12 Lemmons v. Huber, 45 Or. 282, 77 Pac. 836.

13 Rudolph v. Herman, 2 S. Dak. 399, 50 N. W. 833; approving Coker v. Superior Court, 58 Cal. 177; Edminster v. Rathbun, 3 S. Dak. 129, 52 N. W. 263; McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354.

14 McDermott v. Douglass, 5 Cal. 89; Cal. Code Civ. Proc., § 977; Webster v. Hanna, 102 Cal. 177, 36 Pac. 421.

15 People v. Harris, 9 Cal. 571.

16 Lick v. Madden, 25 Cal. 203.

17 Bray v. Redman, 6 Cal. 287.

18 People v. Harris, 9 Cal. 571.

19 Ward v. Rees, 11 Wyo. 459, 72 Pac. 581.

20 Lemmons v. Huber, 45 Or. 282, 77 Pac. 836.

§ 1966. Dismissal.—When the appeal is dismissed because of a failure to prosecute, or for want of jurisdiction, costs may be adjudged against the appellant.[21] And a failure to produce in the superior court a duly certified copy of the justice's docket is a failure to prosecute;[22] but not if the failure is due to the neglect of the justice of the peace.[23] The appeal can only be dismissed after notice.[24] The superior court cannot arbitrarily dismiss the appeal.[25] In denying a motion to dismiss, the supreme court will presume that the superior court did not abuse its discretion, when there is no showing to the contrary.[26] If the undertaking on appeal is defective, in lacking one of the conditions required by law, it is error to dismiss the appeal if the appellant offers to remedy it as to such defect.[27] Where the appeal is erroneously dismissed for a supposed insufficiency in the undertaking, the remedy of the appellant is by *certiorari* to annul the order of dismissal, before proceeding by *mandamus* to compel the hearing of the appeal.[28] An appeal taken on questions of law alone cannot be dismissed on the ground that the appeal should have been taken on questions of law and fact, if the statement on appeal contains the evidence upon which the question of law involved in the appeal was raised and decided in the justice's court, and such dismissal will be annulled on *certiorari*.[29] But an order dismissing an appeal for failure to file a record and transcript within the time prescribed by a rule of the superior court, cannot be annulled on *certiorari*.[30] An order of the superior court vacating a previous order of dismissal, and recalling execution, leaves the cause undetermined and pending before it, as it was when the appeal was first perfected, nor is it necessary to the validity of such order that it should be filed in the justice's court.[31]

Inasmuch as the court should dismiss, on its own motion, for insufficient undertaking, a motion for dismissal on grounds of

21 Blair v. Cummings, 39 Cal. 667.

22 People v. Elkins, 40 Cal. 642.

23 Goodrich v. Peterson, 12 Wyo. 214, 74 Pac. 497.

24 Id.; Cal. Code Civ. Proc., § 980.

25 Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481.

26 State v. Campbell, 5 Wash. 517, 32 Pac. 97.

27 Keehl v. Schaller, 6 Dak. 499, 50 N. W. 195.

28 Levy v. Superior Court, 66 Cal. 292, 5 Pac. 353.

29 Carlson v. Superior Court, 70 Cal. 628, 11 Pac. 788.

30 McKay v. Superior Court, 86 Cal. 431, 25 Pac. 10. Dismissal of appeal for failure to prosecute, as to review, see Alexander v. Municipal Court of Appeal, 66 Cal. 387, 5 Pac. 675.

31 Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193.

lack of jurisdiction, that no proper bond is on file, is a sufficiently definite motion.[32] Since only such questions as were raised in the lower court can be tried on appeal to the district court, if there is no showing of a motion made in the justice's court to set aside the judgment and dismiss the action, it is proper for the higher court to refuse to entertain a motion to dismiss and to try the issues of fact raised in the lower court.[33]

§ 1967. **Jurisdiction.**—If the justice of the peace had no jurisdiction of the subject-matter, the higher court acquires none by an appeal.[34] The objection that a superior court has no jurisdiction in cases of appeal to it from a lower court, where no bond is given as required by statute, should be made in the county court, as the judge thereof, in his discretion, on hearing excuse, might allow appellant to file a bond.[35] So, also, the allowance of an amendment to the complaint is in the discretion of the superior court.[36] The superior court has jurisdiction of an appeal from a justice's court, in an action tried by jury, although when the appeal was taken no judgment had been entered by the justice in conformity with the verdict.[37] So, generally, the superior court having regularly acquired jurisdiction over the cause by the appeal, all proper proceedings in the cause thereafter are as fully within the power of that court as if the cause had been commenced therein, and it may properly dispose of the defense of want of jurisdiction before considering the merits of the case upon the appeal.[38] If a justice of the peace has no jurisdiction of the subject-matter of an action brought before him, the superior court cannot acquire jurisdiction thereof by appeal from the justice.[39] Since the statute provides that if a justice fails to allow an appeal he may be compelled by rule and attachment, a performance of his duties, within the time limited, is not juris-

32 Heiney v. Heiney, 43 Or. 577, 73 Pac. 1038.

33 Clark v. Great Northern, 30 Mont. 458, 76 Pac. 1003.

34 Sims v. Kennedy, 67 Kan. 383, 73 Pac. 51; Parker Grain Co. v. Chicago etc. Ry., 70 Kan. 168, 78 Pac. 407; Rosengrave v. Clelland, 16 Colo. App. 474, 66 Pac. 448; Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695; Shea v. Regan, 29 Mont. 308, 74 Pac. 737; Mettler v. Adamson (Mont.), 99 Pac. 441; Mont. Const., art. 8, § 21.

35 Howard v. Harman, 5 Cal. 78; Coulter v. Stark, 7 Cal. 244. See, also, Blair v. Hamilton, 32 Cal. 50.

36 Canfield v. Bates, 13 Cal. 606.

37 Montgomery v. Superior Court, 68 Cal. 407, 9 Pac. 720.

38 Holbrook etc. v. Superior Court, 106 Cal. 589, 39 Pac. 936.

39 State v. Superior Court, 9 Wash. 369, 37 Pac. 489.

dictional to the appeal.[40] The superior court should, on a question of law alone, reverse a judgment of a justice of the peace in which the title and right of possession of real property is involved.[41]

§ 1968. Jurisdiction of the subject-matter.—Though a justice has no equity jurisdiction, a party on appeal, mistakenly assuming that he is entitled to equitable relief, will not be turned out of court if entitled to relief at law, as law and equity may be administered in the same case.[42] A district court cannot vacate the docketing of an abstract of judgment if want of jurisdiction does not appear on the face of the abstract.[43] In Idaho, an answer to raise issue on title to realty must be verified, and thereupon the justice of the peace loses jurisdiction, and must certify the case to the district court. The same can be accomplished by demurrer only when the complaint shows on its face that the question of title to realty must be settled to allow judgment.[44]

In Oklahoma, no appeal lies to the probate court from the justice court where the amount claimed is less than twenty dollars, where there was no jury trial or judgment by confession.[45]

A defendant appealing from the judgment of a justice of the peace waives the objection that he was not served with process.[46] The circuit court on appeal cannot give a judgment for interest antedating its rendition, where the complaint for the recovery of money does not demand interest.[47]

§ 1969. Amendment of pleadings upon appeal.—Where, upon appeal, the pleadings may be amended so as not to substantially change the issues, the circuit court has no jurisdiction to entertain a demurrer for a defect curable by judgment, which had already been interposed in the justice's court, overruled, and the objection waived by pleading over.[48] An amendment to include an allegation of defendant's promise to pay may be permitted.[49] The fact that a motion to force plaintiff to elect between two causes

40 Goodrich v. Peterson, 12 Wyo. 214, 74 Pac. 497.

41 King v. Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10.

42 Anderson v. Red Metal Min. Co., 36 Mont. 312, 93 Pac. 44.

43 Lund v. Booth, 33 Utah, 341, 93 Pac. 987.

44 Hammer v. Garrett, 15 Idaho, 657, 99 Pac. 124.

45 Maer v. Cox, 21 Okla. 846, 97 Pac. 649.

46 School Dist. etc. Boulder County v. Waters, 20 Colo. App. 106, 77 Pac. 255.

47 Ferguson v. Reiger, 43 Or. 560, 73 Pac. 1040.

48 Byers v. Ferguson, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5.

49 Dixon v. Johnson, 44 Or. 43, 74 Pac. 394.

of action was not made in the justice's court does not prevent its being made in the circuit court, since it does not change the issues.[50] In a replevin suit, the plaintiff may, after suit in the justice's court and pending appeal in the higher court, file an amended bill of particulars, describing and giving the value of each article sued for.[51]

The pleadings in the district court on an appeal from a justice or police court are governed by the same rules as pertain to pleadings in such courts.[52] Defendant's answer cannot be superseded by an amendment filed by defendant after appeal, and setting up an affirmative defense.[53]

A demurrer to the evidence in the district court in a case appealed from a justice, does not bring before it the claim that it lost jurisdiction by the amendment made, which increases the damages claimed to more than the limit of the justice's jurisdiction.[54] No excuse being shown for the delay, and seven months having elapsed from the time of the appeal and the case being called on for trial, it is no abuse of discretion of the court to deny permission to amend an answer on appeal from a justice of the peace.[55] Where defendant on appeal pleads the statute of frauds by amendment, such pleading raises issues of fact to be tried in the ordinary manner, and it is error for the court to render judgment for defendant on the pleadings.[56] Upon appeal, the district court takes mere appellate jurisdiction and can hear and determine the case only as a case within the jurisdiction of the justice.[57] Defendant who defaults in a justice or probate court cannot file an answer in the district court on appeal and there raise an issue of fact for the first time.[58]

§ 1970. Presumptions.—All presumptions should be in favor of the regularity of the proceedings of justices of the peace;[59] such as that a notice filed with the justice was properly served.[60]

50 Harvey v. Southern Pacific Ry. Co., 46 Or. 505, 80 Pac. 1061.

51 Boyce v. Augusta Camp M. W. A., 14 Okla. 642, 78 Pac. 322.

52 Duane v. Molinak, 31 Mont. 343, 78 Pac. 588.

53 Id.

54 Groenmiller v. Kaub, 67 Kan. 844, 73 Pac. 100.

55 Hartford Fire Ins. Co. v. Warbritton, 66 Kan. 93, 71 Pac. 278.

56 Duane v. Molinak, 31 Mont. 343, 78 Pac. 588.

57 Hesser v. Johnson, 13 Okla. 53, 74 Pac. 320.

58 Zimmerman v. Bradford, Kennedy Co., 14 Idaho, 681, 95 Pac. 825.

59 Love v. Moore, 11 Okla. 645, 69 Pac. 871.

60 Morin v. Wells, 30 Mont. 76, 75 Pac. 688.

§ 1971. New trial.—When the appeal is on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court.[61] In case of a judgment by default before the justice no appeal can be had on questions of fact, and there can be no new trial on appeal, nor can questions of law be reviewed unless on a statement.[62] Upon an appeal from a judgment by default in a justice's court, upon questions of law and fact, the superior court must entertain and decide the appeal as upon questions of law alone.[63] The superior court may grant a new trial of a case which has been once tried before it on appeal from a justice's court; and thereupon it is the duty of the county judge to settle a statement duly presented.[64] On an appeal from a justice's court, taken on questions of law and fact, the superior court has no authority to remand the cause from whence it came, for trial *de novo,* but must itself proceed with the trial, and in case of refusal may be compelled to do so by *mandamus,*[65] and the procedure is governed by the practice in such superior court.[66] A judgment, on motion, affirming the judgment of the justice's court is error.[67] But the superior court cannot try the action *de novo,* unless a trial upon the issues of fact as made in the justice's court had been had in that tribunal.[68] The superior court has original jurisdiction of all questions pertaining to the title or possession of real property, and, having jurisdiction of the parties upon the appeal from the justice's court, may properly try an issue as to the possession and right of possession of land.[69] Upon appeal from a judgment in a justice's court setting aside a judgment previously rendered and dismissing the action,

61 Cal. Code Civ. Proc., § 976.

62 People v. County Court, 10 Cal. 19; Funkenstein v. Elgutter, 11 Cal. 328. See Rickey v. Superior Court, 59 Cal. 661.

63 Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481.

64 Cummings v. Irwin, 40 Cal. 354. See White v. Superior Court, 72 Cal. 475, 14 Pac. 87; Massman v. Superior Court, 71 Cal. 582, 12 Pac. 685.

65 Acker v. Superior Court, 68 Cal. 245, 9 Pac. 109, 10 Pac. 416. See Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; Missoula etc. Co. v. Morgan, 13 Mont. 394, 34 Pac. 488; Forbis v. Inman, 23 Or. 68, 31 Pac. 204.

66 Slaughter v. Strouse, 20 Colo. App. 484, 79 Pac. 792.

67 Swinehart v. Pocatello Meat & Produce Co., 8 Idaho, 710, 70 Pac. 1054.

68 Myrick v. Superior Court, 68 Cal. 98, 8 Pac. 648. That no change in the issues can be made, see Forbis v. Inman, 23 Or. 71, 31 Pac. 204; Currie v. Southern Pacific Co., 21 Or. 566, 28 Pac. 884; Waggy v. Scott, 29 Or. 386, 45 Pac. 774.

69 Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196. See Cereghino

the jurisdiction of the superior court is limited to a review of the judgment appealed from, and, if of the opinion that the court erred in vacating the previous judgment, it should reverse the judgment appealed from and order a new trial.[70] In Utah, the filing of a motion for a new trial, in a justice's court suspends the judgment, and appeal cannot be taken until the overruling of the motion.[71] In Montana, all appeals from the justice's court must be tried anew, and in such trial the district court sits as, and has no greater jurisdiction than, the justice of the peace, and either party may have reviewed any question of law or fact raised before the justice and presented to the district court.[72] Petition for a rehearing is a proceeding unknown to the law or to the practice of the superior court.[73]

§ 1972. Statement.—The party appealing, on questions of law alone, shall prepare a statement on appeal within ten days from the rendition of the judgment, and file the same with the justice.[74] And the statement must contain the grounds on which appellant intends to rely, and so much of the evidence as may be necessary to explain the grounds, and no more.[75] If the docket or other papers properly sent up by the justice show the alleged errors, there is no necessity for a statement.[76] Under the Oregon practice, the transcript must be filed in the circuit court on or before the first day of the term next following the allowance of the appeal.[77]

§ 1973. Filing of notice.—The filing of notice of appeal and undertaking on appeal, in a justice's court, after rendition of the verdict, but before entry of judgment, does not deprive the justice of authority to enter up judgment on the verdict.[78]

v. Third District Court, 8 Utah, 455, 32 Pac. 697.

70 Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716.

71 State v. Ritchie, 32 Utah, 381, 91 Pac. 24.

72 State v. Justice Court, 31 Mont. 258, 78 Pac. 498; Duane v. Molinak, 31 Mont. 343, 78 Pac. 588.

73 Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. 481.

74 Cal. Code Civ. Proc., § 975; People v. County Court, 10 Cal. 19. See McKay v. Superior Court, 86 Cal. 431, 25 Pac. 10; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196.

75 Cal. Code Civ. Proc., § 975; People v. County Court, 10 Cal. 19; People v. Freelon, 8 Cal. 517. See, as to settlement of statement, Cal. Code Civ. Proc., § 975.

76 Southern Pacific R. R. Co. v. Superior Court, 59 Cal. 471. As to duty of justice to transmit papers on appeal, see Cal. Code Civ. Proc., § 977, as amended 1897.

77 Carter v. Monnastes, 19 Or. 538, 25 Pac. 29.

78 Fugitt v. Cox, 2 Nev. 370.

§ 1974. Service of notice.—The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in justices' courts.[79] The record not showing that notice was served, appellant may prove by his affidavit that such notice was in fact served.[80] In Colorado, the clerk of the county court must issue summons on appeal, or no judgment can be rendered at the first term after filing of the appeal.[81]

§ 1975. Notice of appeal, etc.—Continued.—The filing of the undertaking on appeal, and the filing and service of the notice of appeal from a justice's court, may be made at any time within thirty days after the rendition of judgment. The time and order of taking the requisite jurisdictional steps within that limit is, however, immaterial.[82] It is sufficient if the notice of appeal be signed by the appellant personally, or by any one he may select for that purpose.[83] And it may be served on the adverse party personally, notwithstanding he was represented in the justice's court by an attorney. Where the adverse party is a corporation, a service on its manager is sufficient to give the superior court jurisdiction.[84] The sufficiency of the notice of appeal must appear on its face, and the question whether it is sufficient to give the respondent actual knowledge of the intention of the appellant to appeal cannot be gone into.[85] A notice sufficiently describes the judgment which gives the name of the court in which it was rendered, the names of the parties, and the date of the judgment.[86] The voluntary appearance of the respondent and his participation without objection in the trial in the superior court, and in the subsequent preparation of a statement for a new trial, is a waiver of any insufficiency in the notice of appeal or in the proof of service thereof.[87]

79 Welton v. Garabardi, 6 Cal. 245.

80 Mendioca v. Orr, 16 Cal. 368.

81 Miller v. Kinsel, 20 Colo. App. 346, 78 Pac. 1075.

82 Dutertre v. Superior Court, 84 Cal. 535, 24 Pac. 284; Hall v. Superior Court, 68 Cal. 24, 8 Pac. 509; Brown v. Jessup, 19 Or. 288, 24 Pac. 232.

83 Totton v. Superior Court, 72 Cal. 37, 13 Pac. 72; Rutledge v. Superior Court, 67 Cal. 85, 7 Pac. 144.

84 Pacific Coast Ry. Co. v. Superior Court, 79 Cal. 103, 21 Pac. 609.

85 Neppach v. Jordan, 13 Or. 246, 10 Pac. 341.

86 Lewis v. Lewis, 4 Or. 209. See, as to sufficiency of notice, Starks v. Stafford, 14 Or. 317, 12 Pac. 670.

87 Matthews v. Superior Court, 70 Cal. 527, 11 Pac. 665.

Appeal is taken in Idaho by filing a notice of appeal with the justice or judge of a probate court, and serving a copy on the adverse party.[89] An appeal taken more than thirty days after judgment gives no jurisdiction to the higher court.[90] An appeal may be had from an order of the justice rendered on question of retaxation of costs, even though the appeal is taken more than thirty days after the original judgment was rendered.[91] In Utah, the filing of notice must either precede its service or be contemporaneous with it—that is, on the same day—and also notice of filing the undertaking must be made after its filing.[92]

§ 1976. Deposit in lieu of bond.—A money deposit in the amount required may be made in lieu of an undertaking for costs on appeal.[93] Also, a deposit of the amount of the judgment appealed from, including costs, will effect a stay of execution.[94] The latter deposit must be transferred with the papers to the superior court; but there is no such provision in reference to the one-hundred-dollar deposit in lieu of an undertaking for the payment of costs on appeal, and it is perhaps the duty of the justice to retain that money.[95] If a cash deposit is made in the amount of the judgment and costs which is in excess of one hundred dollars, it will be taken as a cost-bond, and not as a bond for stay of execution.[96] If the deposit is to effect both an appeal and a stay of proceedings, it must be in an amount equal to one hundred dollars more than the judgment and costs.[97]

§ 1977. Cost-bond on appeal.—An appeal from a justice's court or a police court is not effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on appeal.[98] If a stay of execution is desired, then an additional bond, which may be in the same instrument, in a sum double the amount of the judgment and all costs, or double the value of the property

89 Perkins v. Bridge, 10 Idaho, 189, 77 Pac. 329.

90 State v. District Court, 30 Mont. 93, 75 Pac. 862.

91 Lemmons v. Huber, 45 Or. 282, 77 Pac. 836.

92 State v. Third Judicial Dist. Court, 32 Utah, 418, 91 Pac. 133.

93 Cal. Code Civ. Proc., § 926.

94 Cal. Code Civ. Proc., § 978.

95 Pacific Window Glass Co. v. Smith, 8 Cal. App. 762, 97 Pac. 899.

96 Id.; State v. California M. Co., 13 Nev. 212.

97 Id.; Laws v. Troutt, 147 Cal. 172, 81 Pac. 401.

98 Cal. Code Civ. Proc., § 978; Jones v. Superior Court, 151 Cal. 589, 91 Pac. 505.

claimed and all costs, must be filed, whereupon the justice or judge must, by order, direct a stay of any execution then issued, and refuse to issue execution on the judgment appealed from.[99] If the sureties fail to qualify on the cost-bond, and a new one is filed after thirty days, the superior court acquires no jurisdiction, except to dismiss the appeal;[100] and if an attempt is made to take jurisdiction on the ground that the issue involves title to or possession of real property, the court of appeals will issue a writ of prohibition to said superior court.[101]

§ 1978. Approval of justice.—It is the duty of the justice of the peace, when an appeal-bond is presented, to act without delay. If he receives the bond without objection, it will be too late to disapprove it the next day.[102]

§ 1979. Bond.—Where objection is made within the proper time, for want of an undertaking or for insufficiency thereof, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and, if sufficient excuse is shown, to allow him to file a bond,[103] or to amend.[104] If the bond be void or defective, a new bond may be filed on terms.[105] If in actions for possession of property only one of the two bonds required is filed by defendant and appellant, the appeal should be dismissed.[106]

§ 1980. Justification.—The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, the appeal must be regarded as if no undertaking had been given.[107] The mere filing of an exception to the sufficiency of sureties with the justice is not sufficient.[108] A party who excepts to the sufficiency

99 Cal. Code Civ. Proc., §§ 978, 979. See Ward v. Superior Court, 58 Cal. 519.

100 Lane v. Superior Court, 5 Cal. App. 762, 91 Pac. 405.

101 Id.

102 People v. Harris, 9 Cal. 571.

103 Howard v. Harman, 5 Cal. 78.

104 Cunningham v. Hopkins, 8 Cal. 33.

105 Rabe v. Hamilton, 15 Cal. 31.

106 Heiney v. Heiney, 43 Or. 577, 73 Pac. 1038.

107 Cal. Code Civ. Proc. § 978a. See McCracken v. Superior Court, 86 Cal. 74, 24 Pac. 845; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Perkins v. Bridge, 10 Idaho, 189, 77 Pac. 329.

108 Reynolds v. County Court, 47 Cal. 604.

of sureties may waive the justification,[109] but if appellee insists that the sureties justify, the statute is mandatory on appellant. The mere exception to the sureties does not divest the court of jurisdiction.[110]

§ 1981. Undertaking and sufficiency of.—An undertaking such as the statute requires is a prerequisite to the acquisition of jurisdiction by the superior court of an appeal from a justice's court.[111] But the appellant may make a deposit of money in lieu of an undertaking.[112] The appellant may file a new undertaking in lieu of one insufficient in form.[113] But where the sufficiency of the sureties is excepted to, the appeal cannot be perfected by filing a new undertaking without notice to the adverse party.[114] An undertaking executed by two sureties, one of whom was a practicing attorney in the courts of the state, was held insufficient.[115] It is not essential that the appellant himself should sign the undertaking.[116]

§ 1982. Appeals from justice's court—South Dakota procedure.—On appeal from a judgment rendered in a justice's court, the notice of appeal, demanding a new trial of the case, goes upon the trial calendar of the circuit court, "to be tried anew," subject, so far as the trial is concerned, to the provisions of the Code of Civil Procedure. The appeal is subject to be dismissed for failure to prosecute, or unnecessary delay in bringing it to a hearing, but a motion for such purpose can only be made or heard after notice to the appellant.[117] The appellate court must learn the *status* of the case from the transcript and papers transmitted by the justice, and if such transcript is imperfect or insufficient, a further return may be required by the appellate court,

109 Blair v. Hamilton, 32 Cal. 49.

110 Morin v. Wells, 30 Mont. 76, 75 Pac. 688.

111 Levy v. Superior Court, 66 Cal. 292, 5 Pac. 353; McKeen v. Naughton, 88 Cal. 462, 26 Pac. 354.

112 Mullen v. Hunt, 67 Cal. 69, 7 Pac. 121.

113 Gray v. Superior Court, 61 Cal. 337. See Hosford v. Logus, 13 Or. 130, 11 Pac. 900.

114 Wood v. Superior Court, 67 Cal. 115, 7 Pac. 200. As to sufficiency of affidavit of surety on undertaking, see Brown v. Jessup, 19 Or. 288, 24 Pac. 232; Starks v. Stafford, 14 Or. 317, 12 Pac. 670.

115 Towle v. Bradley, 2 S. Dak. 472, 50 N. W. 1027.

116 Drouilhat v. Rottner, 13 Or. 493, 11 Pac. 221.

117 Keehl v. Scaller, 1 S. Dak. 290, 46 N. W. 934; Myers v. Mitchell, 1 S. Dak. 249, 46 N. W. 245.

but affidavits of parties cannot be used to supply what should but does not appear in the justice's transcript.[118]

§ 1983. Jurisdiction—Waiver.—By appealing from a judgment of a justice of the peace and going to trial upon the merits in the county court, the defendant waives the objection that the justice had no jurisdiction over his person.[119]

§ 1984. Effect of appeal.—In Wyoming, a justice's judgment is vacated by appeal, subject only to revival by a dismissal of the appeal.[120] In California, the judgment of the justice of the peace continues to have full force, and execution may issue thereon, if an undertaking in double the amount of the judgment, including costs, or twice the value of the property, including costs, is not filed with the undertaking for costs upon appeal.[121] In Utah, the filing of a motion for new trial in the justice's court suspends the judgment;[122] and an appeal cannot be taken until the overruling of the motion.[123]

§ 1985. Dismissal.—No individual act of appellant can operate as a dismissal of the appeal; an order for dismissal must be entered upon the records of the district court.[124] In forcible entry and detainer, defendant is not entitled to a dismissal on grounds not presented to the justice.[125]

FORMS IN APPEALS TO SUPERIOR COURTS.

§ 1986. Notice of appeal.

Form No. 509.

[TITLE AS IN JUSTICE COURT.]

You will please take notice, that the plaintiff in the above-entitled action hereby appeals to the superior court of the city and county of . . . , from the judgment therein made and entered

118 Mouser v. Palmer, 2 S. Dak. 466, 50 N. W. 967. See, also, Plymat v. Brush, 46 Minn. 23, 48 N. W. 443.

119 Glatzel v. Binschadler, 21 Colo. 192, 40 Pac. 352. See Mackey v. Briggs, 16 Colo. 143, 26 Pac. 131.

120 Wyo. Rev. Stats. 1899, § 4401; Sess. Laws, 1903, p. 28; Mayott v. Knott, 16 Wyo. 108, 92 Pac. 240.

121 Cal. Code Civ. Proc., §§ 978, 979.

122 Utah Rev. Stats. 1898, §§ 3742-3744; Const., art. 8, § 9.

123 State v. Ritchie, 32 Utah, 381, 91 Pac. 24.

124 Mayott v. Knott, 16 Wyo. 108, 92 Pac. 240.

125 Bonnell v. Gill, 41 Colo. 59, 92 Pac. 13.

in the said justice's court on the . . . day of . . . , 19.., in favor of said defendant, and against said plaintiff, and from the whole of said judgment. This appeal is taken on questions of both law and fact.

[DATE.] [SIGNATURE.]

To J. P., justice of said justice's court, and G. H., attorney for defendant.

§ 1987. Undertaking on appeal—General form.

Form No. 510.

[TITLE AS IN JUSTICE COURT.]

Know all men by these presents, that we, A. B., principal, and C. D. and E. F., sureties, are held and firmly bound unto G. H., in the sum of . . . dollars,[126] lawful money of the United States of America, to be paid to the said G. H. [his] executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands, sealed, and dated this . . . day of . . . , 19..

The condition of the above undertaking is such, that whereas the said G. H. obtained a judgment against the said A. B., before J. P., Esq., justice of the peace of the . . . township, in the county of . . . , state of . . . , on the . . . day of . . . , 19.., for . . . dollars, principal sum, and for . . . dollars, costs; and whereas the above-bounden A. B. is desirous of appealing from the decision of said justice to the superior court of the said county of . . . , [and a stay of proceedings is claimed]: Now, if the above-bounden . . . shall well and truly pay, or cause to be paid, [the amount of said judgment and] all costs, [and obey any order the said superior court may make therein,] if the said appeal be withdrawn or dismissed, or pay [the amount of any judgment and] all costs that may be recovered against the said appellant in the said superior court, [and obey any order the said court may make therein,] then this obligation to be null and void; otherwise to remain in full force and virtue. [SIGNATURES AND SEALS.]

[AFFIDAVIT OF QUALIFICATION.]

126 To stay execution, the amount must be one hundred dollars more than twice the amount of the judgment and costs.

§ 1988. Undertaking for costs and to stay proceedings.

Form No. 511.

[TITLE OF JUSTICE COURT AND CAUSE.]

Whereas, . . . , the plaintiff [or, defendant] in the above-entitled action, has appealed to the superior court of the county of . . . , state of California, from a judgment made and entered against him in said action on the . . . day of . . . , 19.., for . . . dollars, principal sum, and for . . . dollars, costs of said suit:

Now therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby jointly and severally, undertake and promise in the sum of one hundred dollars ($100), that said appellant will pay all costs which may be awarded against him on said appeal, or on a withdrawal or dismissal thereof, not exceeding one hundred dollars ($100), to which amount we acknowledge ourselves jointly and severally bound;

And whereas, the appellant is desirous of staying the execution of said judgment so appealed from, we do further, in the consideration thereof and of the premises, jointly and severally undertake and promise in the further sum of . . . dollars ($ . . .), said sum being an amount double the amount of said judgment and costs, that if said judgment appealed from be affirmed, or the appeal be dismissed or withdrawn, or if judgment be recovered against him in the said action in the superior court, the appellant will pay any judgment and costs that may be recovered against him in the said action in the superior court, not exceeding the sum of . . . dollars ($ . . .).

Witness our hands and seals, this . . . day of . . . , 19..

. . . [SEAL.]

. . . [SEAL.]

§ 1989. Affidavit of qualification of surety.

Form No. 512.

STATE OF CALIFORNIA, }
COUNTY OF . . . } ss.

. . . and . . . , sureties in the within undertaking, being duly sworn, say, each for himself, and not one for the other, that he is worth the sum specified in the said undertaking, over and above all his just debts and liabilities (exclusive of property exempt from

execution), and that he is a resident within the state of California, and . . . holder therein.

[SIGNATURES.]

Subscribed and sworn to before me, this . . . day of . . . , 19.. [SEAL.] . . . , Notary Public
in and for said county.

§ 1990. Judgment dismissing appeal from justice's court for failure to bring action to trial.

Form No. 513.

[TITLE AS IN SUPERIOR COURT.]

The return upon the appeal herein having been filed on the . . . day of . . . , 19.., and said appeal not having been brought to a hearing before the end of the second term of this court thereafter:

Now, on motion of G. H., attorney for [name respondent],

It is adjudged, that said appeal be and is hereby dismissed, and that said [name respondent] do have and recover of [name appellant and his sureties on appeal] the costs and disbursements upon said appeal, taxed at . . . dollars.

§ 1991. Judgment affirming or reversing justice's judgment, where there is no new trial.

Form No. 514.

[TITLE.]

The appeal herein having been brought to a hearing before the court upon the return herein, after hearing G. H., attorney for the appellant, and J. K., attorney for the respondent, the court being now fully advised in the premises:

Upon motion of . . . , attorney for . . . ,

It is adjudged, that the judgment of the justice in this action, adjudging that the said . . . recover of the said . . . the sum of . . . dollars damages and costs [or, otherwise, describe briefly the judgment appealed from, according to the fact], be and the same is hereby affirmed, [or, reversed] in whole [or, reversed in part, to-wit: Here state what part is reversed.]

And it is further adjudged, that said . . . do have and recover of the said . . . and [name sureties on appeal-bond] the costs and disbursements of this appeal, taxed at . . . dollars.

§ 1992. Judgment on appeal from justice's court after trial de novo.

Form No. 515.

[TITLE.]

This action, being an appeal from a judgment rendered by and before L. M., Esq., a justice of the peace of said county, having been tried before the court and a jury, and a verdict having been duly rendered for the plaintiff, and his damages assessed at the sum of . . . dollars: [or, for the defendant; or, if the trial was by the court, insert: by the court, trial by jury having been waived, and the court having made and filed findings of fact and conclusions of law, wherein judgment is ordered for the plaintiff for . . . dollars damages and costs; or, for the defendant.]

Now, on motion of . . . , attorney for . . . ,

It is adjudged, that the plaintiff, A. B., have and recover of C. D., the defendant, and E. F. (surety on appeal-bond) the said sum of . . . dollars damages, and his costs and disbursements, taxed at . . . dollars, making in all the sum of . . . dollars. [Or, that the defendant, C. D., have judgment dismissing the complaint, and recover of A. B., the plaintiff, his costs and disbursements, taxed at . . . dollars.]

CHAPTER LXXII.

CERTIORARI, OR WRIT OF REVIEW.

§ 1993. Defined.—The writ of *certiorari* may be denominated the writ of review.[1] It is a writ issued out of one court and directed to another court or tribunal of inferior jurisdiction, commanding the latter to certify and send up to the former the records in a particular case.[2] While regulated by codes, it does not differ from the common law in essentials;[3] but in Oregon the statutory writ takes the place of the common-law writ.[4] Like the common-law writ, it tries nothing but the jurisdiction, and does not inquire into the regularity of the proceedings, except inasmuch as the jurisdiction depends upon that regularity.[5] The writ of review, under the Oregon statutes,[5a] lies only to review a decision of a proceeding, and not from an interlocutory order, nor to remove a cause for hearing in another court, while *certiorari* was used for both purposes.[6]

The action of the inferior court upon the merits of the case is conclusive, though the review may extend to every issue of law and fact if that issue determines jurisdiction.[7] It is used most commonly to review the proceedings of courts not of record, municipal corporations, special tribunals, commissioners, and officers exercising judicial powers and acting in a summary way.[8]

1 Cal. Code Civ. Proc., § 1067; Noble v. Superior Court, 109 Cal. 523, 42 Pac. 155; Union Pacific R. R. Co. v. Bowler, 4 Colo. App. 25, 34 Pac. 940.

2 Bac. Abr. h. t.; Bouvier's Law Dict.

3 Ellis v. People, 15 Colo. App. 341, 62 Pac. 232.

4 Oregon Ry. etc. Co. v. Umatilla County, 47 Or. 198, 81 Pac. 352.

5 People v. Board of Delegates, 14 Cal. 500; Smith v. City of Portland, 25 Or. 297, 35 Pac. 665; People v. Dwinelle, 29 Cal. 632; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; State v. Judge, 10 Mont. 401, 25 Pac. 1053.

5a B. & C. Comp. Stats. 1901, §§ 595, 603.

6 Holmes v. Cole, 51 Or. 483, 94 Pac. 964.

7 People v. Mayor of New York, 2 Hill, 9; Haviland v. White, 7 How. Pr. 154. Contra: Carter v. Newbold, 7 How. Pr. 154, 166. Compare People v. Board of Supervisors, 77 Cal. 136, 19 Pac. 257; Onesti v. Freelon, 61 Cal. 625; Schirott v. Phillippi, 3 Or. 484; Lowe v. Alexander, 15 Cal. 300.

8 Puterbaugh's Pl. & Pr. 543; Esmeralda County v. District Court, 18 Nev. 438, 5 Pac. 64; State v. Board of Assessments, 3 S. Dak. 338, 53 N. W. 192.

It is sometimes used as an auxiliary process to obtain a full return to some other process; as, in case of diminution of record in an appeal, it may be awarded to secure a perfect transcript of all the papers.[9]

§ 1994. Jurisdiction, as to court issuing writ.—The jurisdiction for issuing the writ of *certiorari* is regulated by code, and extends to all courts except police and justice of the peace courts,[10] and probate courts.[11] The supreme court is always open for issuing the writ,[12] and it may exercise its appellate jurisdiction by means of it;[13] but not where the review might have been had by appeal,[14] unless, possibly, under extraordinary circumstances, as where *certiorari* was allowed, though the order was appealable, to review an order fixing the bond on appeal from an order quashing an execution.[15]

The district court of Colorado cannot review the action of the county court in divorce matters.[16] *Certiorari* will not issue from the supreme court to the court of appeals, unless the latter was without jurisdiction to render the judgment complained of, or unless it clearly ignored some decision of the supreme court, or unless cases are presented involving similar principles.[17] The amended constitution confers original jurisdiction upon the supreme court in the issuance of this writ.[18] Superior judges have power to issue writs and to hear them on their return at cham-

9 Sweet v. Overseers, 3 Johns. 23; Stewart v. Ingle, 9 Wheat. 526, 6 L. Ed. 151; Barton v. Petit, 7 Cranch, 288, 3 L. Ed. 347; State v. District Court, 14 Mont. 452, 37 Pac. 9.

10 Cal. Code Civ. Proc., § 1068; Miller v. Board of Supervisors, 25 Cal. 95.

11 Canadian Bank v. Wood, 13 Idaho, 794, 93 Pac. 257.

12 Tyler v. Houghton, 25 Cal. 27.

13 People v. Turner, 1 Cal. 144.

14 Miliken v. Huber, 21 Cal. 166; Bennett v. Wallace, 43 Cal. 25; Faut v. Mason, 47 Cal. 8; Slavonic etc. Assoc. v. Superior Court, 65 Cal. 500, 4 Pac. 500; Newman v. Superior Court, 62 Cal. 545; McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615; Weill v. Light, 98 Cal. 193, 32 Pac. 943; Estate of McConnell, 74 Cal. 217, 15 Pac. 746; Kearns v. Follansby, 15 Or. 597, 16 Pac. 478; Sioux Falls Nat. Bank v. McKee, 3 S. Dak. 1, 50 N. W. 1057; Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212; People v. Turner, 1 Cal. 144.

15 State v. Superior Court, 32 Wash. 693, 73 Pac. 779; Keys v. Marin County, 42 Cal. 254; State v. Superior Court, 34 Wash. 248, 75 Pac. 809.

16 Carlton v. Carlton (Colo.), 96 Pac. 995.

17 People v. Court of Appeals, 33 Colo. 264, 79 Pac. 1021; People v. Court of Appeals, 32 Colo. 147, 75 Pac. 407; Jumbo Mining Co. v. District Court, 28 Nev. 253, 81 Pac. 153.

18 Miller v. Board of Supervisors, 25 Cal. 95.

bers.[19] It is not necessary that a court have appellate jurisdiction; the writ may issue from a superior court to an inferior judge;[20] but the writ will not lie to compel the return of a case to the justice's court after judgment in the superior court on appeal.[21] Where the superior court has not exclusive or original jurisdiction, *certiorari* cannot be maintained.[22]

The granting or refusal of the writ is within the discretion of the court, and the court will consider the public convenience when invoked to review the acts of special jurisdictions which are created by statute and do not proceed according to the common law.[23] The writ will be refused where it appears that it will have no beneficial effect.[24] The constitutional provision authorizing the supreme court to issue writs of *certiorari* refers to the common-law writ, and the general assembly cannot abridge or enlarge the same.[25] The supreme court will assume jurisdiction in *certiorari* to review a judgment depriving an election judge of one party of the joint custody of the registration lists and his share of the ballots.[26] It will also review an adjudication in condemnation proceedings.[27] The paraphrase in the California constitution, "all cases at law which involve the title or possession to real property," as given in *Holman* v. *Taylor* (31 Cal. 338), does not mean that the constitution withdrew from justices of the peace jurisdiction in actions of trespass, founded upon the possession of real estate, but only where the right of possession was an issuable fact in the case.[28] In Michigan, the writ lies to review an order of the circuit court.[29] When an application is made for a writ

19 People v. Supervisors of Marin County, 10 Cal. 346.

20 Chard v. Harrison, 7 Cal. 113; People v. Board of Supervisors, 8 Cal. 58. As to granting of ferry license by the board, see Murray v. Board of Supervisors, 23 Cal. 493; Le Roy v. Mayor of New York, 20 Johns. 430; Ex parte Mayor of Albany, 23 Wend. 277.

21 Armantage v. Superior Court, 1 Cal. App. 130, 81 Pac. 1033.

22 Fowler v. Lindsey, 3 Dall. 411, 1 L. Ed. 658.

23 Keys v. Marin County, 42 Cal. 255; Hagar v. Superior Court, 47 Cal. 228; Rutland v. Commissioners of Worcester, 20 Pick. 79; Burgett v. Apperson, 52 Ark. 213, 12 S. W. 559; Burnett v. Douglas County, 4 Or. 388.

24 Burr v. Board of Supervisors, 96 Cal. 210, 31 Pac. 38; State v. Rose, 4 N. Dak. 319, 58 N. W. 514, 26 L. R. A. 593; Farmington River Water Power Co. v. County Commissioners, 112 Mass. 206; State v. Orrick, 106 Mo. 111, 17 S. W. 176, 329.

25 Leppel v. District Court, 33 Colo. 24, 78 Pac. 682.

26 People v. District Court, 33 Colo. 14, 84 Pac. 694.

27 Seattle etc. Co. v. Bellingham Bay E. R. Co., 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107.

28 Pollock v. Cummings, 38 Cal. 685.

29 Jerome v. Williams, 13 Mich. 521.

out of the supreme court to the justice's court, it must be shown why the writ was not obtained from a circuit court or judge; and if judgment in the justice's court is void for want of jurisdiction, it will be reversed on the *certiorari*.[30] It lies from a probate to a justice's court, and from the circuit court of the District of Columbia to the justice of the peace, in cases of forcible entry and detainer.[31]

§ 1995. Jurisdiction, as to subject-matter.—The writ may be granted "when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."[32] *Quo warranto*, and not *certiorari*, is the proper remedy to try rights of parties to hold an office.[33] The office of *certiorari* is to bring up for review final adjudications of inferior tribunals.[34]

An order of a superior court extending the time for defendant to plead until ten days after the receipt of the *remittitur* in another action, then pending on appeal in the supreme court, is, in so far as it attempts to extend the time to plead more than thirty days, in excess of the jurisdiction of the superior court, and may be reviewed on *certiorari*.[35] The question of jurisdiction depends upon the amount of the judgment below, and not the amount prayed for.[36] A contempt affidavit is not sufficient to confer jurisdiction, and allow review by *certiorari*.[37] The remedy is by *certiorari* where a city alderman is disturbed in the enjoyment of his office.[38]

30 Hurlbut v. Wilcox, 19 Wis. 419.

31 Paul v. Armstrong, 1 Nev. 82; Holmead v. Smith, 5 Cranch C. C. 343, Fed. Cas. No. 663; State v. Case, 14 Mont. 526, 37 Pac. 95; State v. Evans, 13 Mont. 539, 48 Am. St. Rep. 701, 39 Pac. 850, 28 L. R. A. 127; State v. Case, 14 Mont. 520, 37 Pac. 95; Union County v. Slocum, 16 Or. 237, 17 Pac. 876; Prickett v. Cleek, 13 Or. 415, 11 Pac. 49; Weimmer v. Sutherland, 74 Cal. 341, 15 Pac. 849.

32 Cal. Code Civ. Proc., § 1068.

33 Beaumont v. Samson, 5 Cal. App. 491, 90 Pac. 839.

34 People v. County Judge, 40 Cal. 480; Gauld v. Board of Supervisors, 122 Cal. 18, 54 Pac. 272; State v. Justice's Court, 31 Mont. 258, 78 Pac. 498.

35 Baker v. Superior Court, 71 Cal. 583, 12 Pac. 685; Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152.

36 Wratten v. Wilson, 22 Cal. 465.

37 Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409. For other cases on jurisdiction, see Tinn v. United States District Attorney, 148 Cal. 773, 113 Am. St. Rep. 354, 84 Pac. 152; Smith v. Superior Court (Cal. App.), 84 Pac. 54.

38 Board of Aldermen v. Darrow, 13 Colo. 460, 16 Am. St. Rep. 216, 22 Pac. 584.

§ 1996. **Exercising judicial functions.**—There must be a final judgment in the inferior tribunal before the upper court will review it by *certiorari*. Where the defendant gave a defective appeal-bond, and a motion to dismiss was overruled, and there was no basis for damages to the amount asked against the plaintiff, *certiorari* should issue to review the order sustaining the appeal.[39] Where an order is made by the inferior court after an appeal and stay-bond is filed, it may be vacated on *certiorari* in the appellate court.[40] That an order levying a tax was not signed by the county commissioners when the writ of review was instituted to vacate the order was no ground for vacating the same.[41] The court appointing a special administrator does not exceed its jurisdiction even though a daughter of decedent seeks appointment.[42] The setting aside of a verdict and granting a new trial is an intermediate order, and not a final determination of the matter on which to base application for the writ.[43]

§ 1997. **Judicial functions, as opposed to executive functions.**—The board of equalization exercises judicial functions;[44] also the superintendent of public instruction, in revoking a teacher's license.[45] The decision of the board of delegates in the case of a contested election for chief engineer is a judicial decision, and subject to review as to whether the board exceeded its jurisdiction;[46] but the determination of an election may be merely a calculation and not a judicial act, and thus not reviewable.[47]

The following have been held not to be judicial acts: The granting of a franchise by the board of supervisors to the highest bidder;[48] the action of fire commissioners in granting a permit to erect a building on the petition of three fourths of the property-owners in the block;[49] the letting of a contract for public work;[50]

39 Territory v. Doan, 7 Ariz. 89, 60 Pac. 893.

40 Los Angeles City Water Co. v. Superior Court, 124 Cal. 385, 57 Pac. 216.

41 Oregon Ry. etc. Co. v. Umatilla County, 47 Or. 198, 81 Pac. 352.

42 Dahlgren v. Superior Court, 8 Cal. App. 622, 97 Pac. 681.

43 People v. County Court, 26 Colo. 478, 58 Pac. 591.

44 Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165.

45 Browne v. Gear, 21 Wash. 147, 57 Pac. 359.

46 People v. Board of Delegates, 14 Cal. 479.

47 State v. Osburn, 24 Nev. 187, 51 Pac. 837.

48 People v. Board of Supervisors, 122 Cal. 421, 55 Pac. 131.

49 Frasher v. Rader, 124 Cal. 132, 56 Pac. 797.

50 Hammer v. Smith (Ariz.), 94 Pac. 1121; Adleman v. Pierce, 6 Idaho, 294, 55 Pac. 658.

the action of a city council in deciding to issue bonds in accordance with an election;[51] the action of a mayor in removing a fire commissioner;[52] also, the acts of commissioners in rescinding an order granting a lease of a toll-road.[53]

§ 1998. Judicial functions, as opposed to legislative functions.—It is a judicial act when the supervisors reject an official bond for any other reason than that it is not in form and substance in compliance with the requirements of the statute, or not sufficiently secured.[54] Deciding to open or close a street is a legislative and not a judicial act, and not reviewable, as is also the appointment of commissioners to assess benefits and damages;[55] or the granting and revoking of saloon licenses;[56] or the granting of a public franchise.[57]

§ 1999. Exceeding jurisdiction.—Only the judicial functions in excess of jurisdiction will be considered in review, for the inquiry on *certiorari* is limited to whether the court below had jurisdiction,[58] or had exceeded its jurisdiction, or greatly abused its discretion.[59] There must have been an excess of jurisdiction before the court can interfere by *certiorari*.[60] Merely deciding wrongly in a case will not warrant the writ,[61] nor will a mere defect of jurisdiction.[62] However, the supreme court of Utah, upon

51 State v. Osburn, 24 Nev. 187, 51 Pac. 837.

52 In re Carter, 141 Cal. 316, 74 Pac. 997.

53 Southern Development Co. v. Douglass, 26 Nev. 50, 63 Pac. 38.

54 Miller v. Board of Supervisors, 25 Cal. 94.

55 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

56 State v. Superior Court, 50 Wash. 650, 97 Pac. 778.

57 Tenny v. Seattle Elec. Co., 48 Wash. 150, 92 Pac. 895.

58 Goodman v. Superior Court, 8 Cal. App. 232, 96 Pac. 395; State v. Superior Court, 48 Wash. 141, 92 Pac. 942.

59 Borchard v. Board of Supervisors, 144 Cal. 10, 77 Pac. 708; In re Hanson, 2 Cal. 263; California Pacific R. R. Co. v. Central Pacific R. R. Co., 47 Cal. 528; People v. Johnson, 30 Cal. 98; Holbrook v. Superior Court, 106 Cal. 589, 39 Pac. 936; White v. Superior Court, 110 Cal. 60, 42 Pac. 480; State v. Judge etc., 10 Mont. 401, 25 Pac. 1053; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Elder v. Justice's Court, 136 Cal. 364, 68 Pac. 1022.

60 Hansen v. Anderson, 21 Utah, 286, 61 Pac. 219; State v. First Judicial District, 26 Nev. 253, 66 Pac. 743; Coulter v. Stark, 7 Cal. 245; Wratten v. Wilson, 22 Cal. 465; Winter v. Fitzpatrick, 35 Cal. 269; Nordyke etc. Co. v. McConkey, 7 Idaho, 562, 64 Pac. 893.

61 People v. Burney, 29 Cal. 460; People v. Dwinelle, 29 Cal. 635; Barber v. San Francisco, 42 Cal. 630; Montreal v. Bush, 46 Cal. 79; Central Pacific R. R. Co. v. Placer County, 46 Cal. 667; Reynolds v. County Court, 47 Cal. 604.

62 Fowler v. Lindley, 3 Dall. 411,

certiorari, considers errors of law, and considers the question upon its merits.[63]

Objection to a complaint and jurisdiction may be raised by *certiorari*;[64] as, also, the review of an order suspending or disbarring an attorney, when made without application or notice.[65] It will not lie when the court has jurisdiction which is questioned only by supplemental answer, which pleads a former judgment as a bar to the action,[66] nor to review the action of a board of supervisors in narrowing a street.[67] The appointment of a receiver on *ex parte* application, after defendant had appeared, may be annulled by *certiorari*.[68]

§ 2000. **Appeal.**—Where there is no appeal the writ will lie; as where a new jurisdiction, unknown to the common law, is created by statute, a writ of error will not lie, but *certiorari* will;[69] as, also, in absence of express prohibition, when a court acts in a summary manner, or in a new course, different from the common law.[70] Whether the error occurred in proceedings either civil or criminal, if it cannot be reached by appeal or some other statutory remedy, *certiorari* is the proper remedy;[71] as in case of the district court fining and imprisoning for contempt, without setting forth the facts.[72] Where the error might have been corrected by appeal to the county court, the district court cannot get jurisdiction by *certiorari*.[73]

1 L. Ed. 658. Contra: Kennedy v. Gorman, 4 Cranch C. C. 347, Fed. Cas. No. 770.

63 Salt Lake City Water etc. Co. v. Salt Lake City, 24 Utah, 282, 67 Pac. 791.

64 Adams v. Kelly, 44 Or. 66, 74 Pac. 399.

65 McNamee v. Steele, and Goode v. Steele, 8 Idaho, 538, 539, 69 Pac. 319.

66 Wilson v. Morse, 25 Nev. 375, 60 Pac. 832.

67 Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82.

68 Cummings v. Steele, 6 Idaho, 666, 59 Pac. 15; Sweeney v. Mayhew, 6 Idaho, 455, 56 Pac. 85.

69 2 Tidd. Pr. 1051; Campbell v. Strong, Hempst. 195, Fed. Cas. No. 2367b.

70 State v. Dodge Co., 56 Wis. 79, 13 N. W. 680.

71 People v. Turner, 1 Cal. 152.

72 Ex parte Field, 1 Cal. 187; State v. District Court, 13 Mont. 347, 34 Pac. 39. Compare Golden Gate Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

73 State v. Justice's Court, 31 Mont. 258, 78 Pac. 498; Gray v. Schupp, 4 Cal. 185; Dahlgren v. Superior Court, 8 Cal. App. 622, 97 Pac. 681; Tingley v. Superior Court, 8 Cal. App. 47, 96 Pac. 20; Richmond v. Houser (Cal. App.), 96 Pac. 908; Dent v. Superior Court, 7 Cal. App. 683, 95 Pac. 672; Gunderson v. Dist. Court, 14 Idaho, 478, 94 Pac. 166; Idaho Rev. Codes, § 4962; State v. Superior Court, 49 Wash. 203, 94 Pac. 920.

Certiorari should be taken from the police court when an appeal can be maintained.[74] Where the code gives appeal from orders for partial distribution of an estate,[75] or from an order appointing a general administrator, entered after a will has been annulled, *certiorari* will not lie,[76] regardless of the fact that the expense of appeal will be heavy.[77] The following, also are appealable, and not subject to review by *certiorari:* The dismissal of an appeal because the sureties to the bond did not justify;[78] the rulings of a trial court;[79] an order restraining a party from conducting business in a certain building;[80] the refusal of a justice of the peace to set aside a default judgment;[81] an intermediate order substituting another counterclaimant;[82] an order appointing a guardian of an aged person, without notice to him or inquisition;[83] an order denying application to sue a receiver;[84] a special order made after judgment, and providing for costs out of the plaintiff's judgment;[85] the dismissal of an appeal, though the relator avers that he cannot furnish an appeal-bond;[86] an order of a trial court to strike out a stay-bond on appeal from the files, and to direct the sheriff to pay over the judgment money to the other party, though the code does not provide for an appeal from special orders after final judgment;[87] an order granting injunction.[88]

When appellant claims that the statements are necessary, as the errors upon which he relies appear upon the face of the record, it is error within, and not an excess of, jurisdiction, for which relief can be had by *certiorari*.[89] But *certiorari* will lie where

74 State v. Lockhart, 28 Wash. 460, 68 Pac. 894.

75 State v. District Court, 26 Mont. 378, 68 Pac. 411.

76 State v. Superior Court, 28 Wash. 677, 69 Pac. 375.

77 Canadian Bank v. Wood, 13 Idaho, 794, 93 Pac. 257.

78 State v. District Court, 27 Mont. 179, 70 Pac. 516.

79 State v. District Court, 27 Mont. 280, 70 Pac. 981.

80 State v. Superior Court, 30 Wash. 177, 70 Pac. 256.

81 State v. District Court, 28 Mont. 445, 72 Pac. 867.

82 State v. Denny, 34 Wash. 56, 74 Pac. 1021.

83 People v. District Court, 33 Colo. 77, 79 Pac. 1013.

84 State v. Superior Court, 38 Wash. 23, 80 Pac. 195; Grant v. Justice Court, 1 Cal. App. 383, 82 Pac. 263; State v. Justice Court, 31 Mont. 258, 78 Pac. 498.

85 Elledge v. Superior Court, 131 Cal. 279, 63 Pac. 360.

86 State v. Second Judicial District Court, 24 Mont. 238, 61 Pac. 309.

87 Southern California Ry. Co. v. Superior Court, 127 Cal. 417, 59 Pac. 789; Parker v. Superior Court, 25 Wash. 544, 66 Pac. 154.

88 Herbert v. Superior Court (Cal.), 91 Pac. 800.

89 People v. Burney, 29 Cal. 459.

judgment is entered against the sureties on a stay-bond, after their release by the sale under execution, because in excess of jurisdiction,[90] or where there is no appeal from the recorder's court of a city.[91]

§ 2001. **Plain, speedy, and adequate remedy.**—The appellee does not have plain, speedy, and adequate remedy when the district court erroneously orders him to give a cost-bond as a nonresident;[92] nor where his remedy is by injunction against a tax-sale, or by objection and appeal in answer to a foreclosure tax-sale, which cannot be commenced until three years after the delinquency;[92a] nor where an appeal would not probably be determined before the term of office expired;[93] nor from an order awarding certain amounts to an administrator and his attorney.[94] The writ cannot issue on the grounds that the process by appeal is not speedy.[95] The right of appeal given to landowners by the code precludes resort to *certiorari*, and the existence of adequate remedy is immaterial.[96] An order granting a statement on a motion for new trial can be remedied at law, and *certiorari* will not lie.[97] A landlord cannot have the writ of review the quashing of a writ of restitution in an unlawful detainer suit.[98]

§ 2002. **Certiorari will not lie.**—The writ will not lie to review an order denying a motion to discharge a receiver on relation of a stockholder;[99] nor to correct a judgment entered in the superior court in equity;[100] nor to determine the validity of a conviction in a police court, and to review the action of a police judge in ordering or summoning a jury;[101] The common-law writ cannot be converted

90 State v. District Court, 22 Mont. 449, 74 Am. St. Rep. 618, 57 Pac. 89.

91 Wong Sing v. City of Independence, 47 Or. 231, 83 Pac. 387; Loloff v. Heath, 31 Colo. 172, 71 Pac. 1113.

92 State v. Napton, 24 Mont. 450, 62 Pac. 686.

92a Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165.

93 State v. Superior Court, 46 Wash. 616, 123 Am. St. Rep. 948, 91 Pac. 4, 12 L. R. A. (N. S.), 1010.

94 In re Sullivan's Estate, and Corcoran v. Bell, 36 Wash. 217, 78 Pac. 946; Flagg v. Columbia County, 51 Or. 172, 94 Pac. 184.

95 State v. District Court, 24 Mont. 494, 62 Pac. 820; State v. Denney, 34 Wash. 56, 74 Pac. 1021.

96 State v. District Court, 29 Mont. 153, 74 Pac. 200.

97 Fountain Water Co. v. Superior Court, 139 Cal. 648, 73 Pac. 590.

98 State v. Superior Court, 49 Wash. 203, 94 Pac. 920.

99 State v. Superior Court, 28 Wash. 584, 68 Pac. 1052.

100 Weldon v. Superior Court, 138 Cal. 427, 71 Pac. 502.

101 Valentine v. Police Court, 141 Cal. 615, 75 Pac. 336; Wittman v. Police Court, 145 Cal. 474, 78 Pac. 1052.

into a suit in equity for the administration of a public charity;[102] nor to review the errors in assessing benefits by the construction of drains.[103] The writ will not lie where the court of appeals had jurisdiction and did not decide so in conflict with prior decisions of the supreme court as to render the decision reviewable by *certiorari*.[104] It will not lie in case of property taken for public use without compensation;[105] nor in case of resolutions of a board of supervisors to raise money upon the credit of the county;[106] nor to review the proceedings of tax commissioners after the assessment-rolls have been delivered;[107] nor, it seems, where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for commitment;[108] nor to bring proceedings in insolvency cases before the supreme court;[109] nor to bring up for review an erroneous decision of the county court in overruling a demurrer;[110] nor to review the action of the district court in punishing as for contempt;[111] nor to bring up proceedings of a justice against tenants holding over;[112] nor to prevent a threatened excess of jurisdiction;[113] nor to review an appealable order, either before or after the expiration of the time for appealing therefrom.[114]

If the court has jurisdiction to hear and decide a motion before it, its decision thereon cannot be reversed upon *certiorari*, no matter whether the decision was right or wrong, upon the evidence before the court.[115] Errors and irregularities in the justice's court, where the court has jurisdiction, will not be examined on *certiorari*;[116] nor if it is a judgment on default, and erroneous.[117] An order setting aside a default is appealable, and not reviewable by writ of

102 People v. Court of Appeals, 33 Colo. 261, 79 Pac. 1028.

103 State v. Superior Court, 31 Wash. 32, 71 Pac. 601.

104 People v. Court of Appeals, 32 Colo. 147, 75 Pac. 407; Grannis v. Superior Court, 143 Cal. 630, 77 Pac. 647.

105 People v. Nearing, 27 N. Y. 306; Lamb v. Schottler, 54 Cal. 319.

106 Dickenson v. Supervisors, 43 Barb. 232.

107 People v. Commissioners, 43 Barb. 494.

108 Walton v. Gatlin, 1 Wins. (60 N. C.) 318.

109 People v. Shepard, 28 Cal. 115.

110 People v. Burney, 29 Cal. 459.

111 People v. Dwinelle, 29 Cal. 632.

112 Lenox v. Arguelles, 4 Cranch C. C. 477, Fed. Cas. No. 8244.

113 Sayers v. Superior Court, 84 Cal. 642, 24 Pac. 296.

114 Stutmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615; In re McConnell, 74 Cal. 217, 15 Pac. 746; Lewis v. Gilbert, 5 Wash. 534, 32 Pac. 459; Nevada Central R. R. Co. v. District Court, 21 Nev. 409, 32 Pac. 673.

115 History Co. v. Light, 97 Cal. 56, 31 Pac. 627; Holbrook v. Superior Court, 106 Cal. 589, 39 Pac. 936.

116 Sherer v. Superior Court, 94 Cal. 354, 29 Pac. 716.

117 Reagan v. Justice Court, 75 Cal. 253, 17 Pac. 195; Saunders v.

review.[118] It will not issue to review the action of a trial court in granting a new trial;[119] nor to review a judgment which has been fully satisfied;[120] nor to review the action of the superior court, in denying the plaintiff's motion for judgment, after finding in his favor upon a plea in abatement, and granting leave to defendant to further plead;[121] nor can it be directed to an ex-official after he has parted with the records sought to be reviewed.[122]

Certiorari is not the proper remedy to enforce the right of a lessee whose lease of school land has been canceled by the board of land commissioners.[123] Except in case of fraud, an order allowing a claim against a county by a board of supervisors must be reversed by *certiorari*.[124] It will not lie to annul the action of a board of supervisors in denying an application for a license to sell liquor at retail.[125] The amount in controversy does not make any difference, since the question is one of jurisdiction only.[126] The supreme court cannot review mere errors of law of the county court in cases where it has jurisdiction, even though there is no appeal.[127]

§ 2003. Questions that may be raised.—All questions of jurisdiction, power, and authority of the inferior tribunal to do the act complained of, and all questions of regularity in the proceedings—i. e. all questions as to whether the inferior tribunal has kept within the bounds prescribed for it by the express terms of statute law, or by well-settled principles of the common law—may be considered.[128] It may determine whether there is any evidence, but not upon the weight and force of the evidence;[129] also, whether the fact of jurisdiction is established.[130] So the court record and

Sioux City Nursery, 6 Utah, 431, 24 Pac. 532; Ducheneau v. House, 4 Utah, 363, 10 Pac. 427.

118 Gibson v. Superior Court, 83 Cal. 643, 24 Pac. 152.

119 State v. Superior Court, 6 Wash. 201, 33 Pac. 387.

120 Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489.

121 State v. Superior Court, 9 Wash. 366, 37 Pac. 454.

122 In re Dance, 2 N. Dak. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

123 State Board of Land Commissioners v. Carpenter, 16 Colo. App. 436, 66 Pac. 165.

124 El Dorado County v. Elstner, 18 Cal. 144.

125 Knox v. Rainbow, 111 Cal. 539, 44 Pac. 175.

126 Winter v. Fitzpatrick, 35 Cal. 269.

127 People v. Burney, 29 Cal. 459.

128 Lynde v. Noble, 20 Johns. 80; People v. Mayor, 2 Hill, 9-11; People v. Metropolitan Board of Police, 39 N. Y. 506; McCulley v. Cunningham, 96 Ala. 583, 11 South. 694; Poe v. Marion Machine Works, 24 W. Va. 517.

129 People v. Overseers of Ontario, 15 Barb. 286.

130 People v. Goodwin, 5 N. Y. 568.

evidence may be examined.[131] It is not sufficient to take the unsworn evidence of one of twenty-five signers of a petition for the formation of a sanitary district that the signers to the number of twenty-five were freeholders, and that their signatures were genuine.[132] But the court cannot review the evidence, on *certiorari*, issued in aid of a writ of *habeas corpus* to secure the release of one committed for violating a restraining order.[133]

In reviewing the appointment of a receiver, the only question is that of jurisdiction.[134] The correction of an improper action of the district court in quashing the jury list should be made by *certiorari*, and not by *mandamus;*[135] also, the review of an order taxing costs under section 1722 of the Montana Code of Civil Procedure, as amended in 1899;[136] also, the correction of an order adjudging one guilty of contempt, though execution has been suspended.[137] In reviewing the action of the board of medical examiners, the review is limited to the usual scope of investigation.[138] The constitutionality of a revenue law cannot be considered on application of private persons in a matter involving their private right;[139] but the necessity and public use for which property is sought to be condemned may be reviewed on *certiorari*.[140] Abbreviations used to describe certain railroad property are not insufficient, *per se*, to justify a vacation of the assessment on a writ of review.[141] *Certiorari* is the proper remedy to bring up proceedings of a justice of the peace in condemnation of land proceedings.[142]

The review never extends to the merits of the case.[143] Inquiry may be made into the principles upon which judges assess damages

131 McClatchy v. Superior Court, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691.

132 Stumpf v. Board of Supervisors, 131 Cal. 364, 82 Am. St. Rep. 350, 63 Pac. 663.

133 In re Boyle, 26 Mont. 365, 68 Pac. 409, 471; State v. District Court, 26 Mont. 365, 68 Pac. 409.

134 Gibbs v. Morgan, 9 Idaho, 100, 72 Pac. 733.

135 Heitman v. Morgan, 10 Idaho, 562, 79 Pac. 225.

136 Sess. Laws 1899, p. 147; State v. District Court, 32 Mont. 20, 79 Pac. 410.

137 State v. District Court, 33 Mont. 138, 82 Pac. 789.

138 Raaf v. State Board of Medical Examiners, 11 Idaho, 707, 84 Pac. 33.

139 McConnell v. State Board of Equalization, 11 Idaho, 652, 83 Pac. 494.

140 State v. Superior Court, 30 Wash. 232, 70 Pac. 484.

141 Oregon Ry. etc. Co. v. Umatilla County, 47 Or. 198, 81 Pac. 352.

142 Leyba v. Armijo, 11 N. Mex., 437, 68 Pac. 939.

143 People v. Board of Delegates, 14 Cal. 479; Cal. Code Civ. Proc., § 1074; Quinchard v. Board of Trustees, 113 Cal. 664, 45 Pac. 856; Contra: Salt Lake City Water etc. Co. v. Salt Lake City, 24 Utah, 282, 67 Pac. 791.

in cases of assessments.[144] Where officers make an order which is *coram non judice*, it is properly canceled by *certiorari*.[145] Where appealable, the decision of commissioners in highway cases may be removed into the supreme court by *certiorari*, but not to review action of laying out a road.[146] In case of municipal assessments for improvements *certiorari* will lie;[147] also, in case of *habeas corpus* order.[148] Where a writ of *mandamus* was issued by the county court, commanding the clerk to issue a writ of restitution upon *remittitur* filed in the district court,[149] and where a county court exercised a judicial power which belongs to the board of supervisors in a non-judicial capacity, as the granting of a ferry license,[150] and where the acts of a board exercising judicial power in a contested election are questioned, the proper remedy is by writ of *certiorari*.[151]

§ 2004. Proceedings in certiorari—Petition.—The application for a writ of review is an action as defined by the code.[152] It must state the amount of the judgment, what it was for, that it was rendered, and against whom; and the petition will be dismissed if it does not allege that the facts therein stated were proved, or does not give reasons why they were not proved.[153] A petition to review the decision of the appellate court in which an opinion is on file should include a copy thereof;[154] but a petition need not allege that the substantial rights of the petitioner were injured by the erroneous judgment and the proceedings of the justice of the peace.[155] A petition is not fatally defective because not entitled in

144 Stone v. Mayor of New York, 25 Wend. 157. But see Matter of Mount Morris Square, 2 Hill, 14. Further, as to assessments, see Bouton v. President etc. of Brooklyn, 2 Wend. 395. As to taxation, see Lawton v. Commissioners, 2 Caines, 182. In summary proceedings, see Niblo v. Post, 25 Wend. 280.

145 Starr v. Trustees, 6 Wend. 564; Widly v. Washburn, 16 Johns. 49.

146 Lawton v. Commissioners, 2 Caines, 179; Commissioners v. Claw, 15 Johns. 537; Baldwin v. City of Buffalo, 25 N. Y. 375.

147 Le Roy v. Mayor of New York, 20 Johns. 430; Elmendorf v. Mayor, 25 Wend. 693; People v. City of Rochester, 21 Barb. 656.

148 People v. Mayer, 16 Barb. 362; Spencer v. Hilton, 10 Wend. 608.

149 Clary v. Hoagland, 5 Cal. 476.

150 Chard v. Harrison, 7 Cal. 113.

151 People v. Board of Delegates, 14 Cal. 479.

152 State v. Superior Court, 40 Wash. 453, 82 Pac. 878.

153 Boyd v. Clark, 21 Tex. 426; Baldwin v. Hardin, 21 Tex. 443. For sufficiency of petition, see Sayers v. Superior Court, 84 Cal. 642, 24 Pac. 296; Marsh v. Superior Court, 88 Cal. 595, 26 Pac. 962.

154 Ingersoll v. Court of Appeals, 27 Colo. 410, 61 Pac. 594.

155 Ferguson v. Byers, 40 Or. 468, 67 Pac. 1115, 69 Pac. 32.

a particular court, as a petition in an ordinary action,[156] nor for failure to set out the date of the order of final settlement, nor for not sufficiently setting out the error complained of.[157] The application must be presented by the party or his attorney, and not by the clerk.[158] The record sought to be reviewed by a writ of review should not be attached as an exhibit to the petition for the writ.[159]

§ 2005. The same—Affidavit.—The application for the writ must be made on the verified petition of the party beneficially interested.[160] The application must state that it is made in good faith, and not to delay the proceedings.[161] Opposing affidavits may be received, but the writ cannot be contradicted by affidavits of the petitioner.[162] Where the affidavit does not set forth a copy of the order complained of, as required by rule 2 of the supreme court, nor state any excuse therefor, the application will be denied.[163] When an application is made to the supreme court or district court of appeal, the affidavit should show a sufficient reason why it is not made to a lower court.[164]

§ 2006. The same—Parties.—A superior court whose order is sought to be reviewed is a necessary party.[165] Any one not a party to summary proceedings cannot sue out a *certiorari*.[166] Heirs may petition for *certiorari* to revise the order of a county court, under which the homestead of the deceased was not legally disposed of.[167] A defendant in a criminal case cannot take out a writ, except by special allowance of the supreme court or a judge thereof, or by consent of the attorney-general; but such writ may be sued out

156 Farrow v. Nevin, 44 Or. 496, 75 Pac. 711.

157 Seattle etc. R. Co. v. Bellingham Bay E. R. Co., 29 Wash. 491, 92 Am. St. Rep. 907, 69 Pac. 1107.

158 State v. District Court, 24 Mont. 238, 61 Pac. 309.

159 Gaston v. City of Portland, 48 Or. 82, 84 Pac. 1040.

160 Cal. Code Civ. Proc., § 1069; Burr v. Board of Supervisors, 96 Cal. 210, 31 Pac. 38; Ashe v. Board of Supervisors, 71 Cal. 236, 16 Pac. 783; Champion v. Commissioners, 5 Dak. 416, 41 N. W. 639.

161 Cunningham v. La Crosse Packet Co., 10 Minn. 299.

162 Borchard v. Board of Supervisors, 144 Cal. 10, 77 Pac. 708; People v. Supervisors, 1 Hill, 195; Saratoga etc. R. R. Co. v. McCoy, 5 How. Pr. 378.

163 State v. District Court, 26 Mont. 224, 67 Pac. 114, 68 Pac. 470.

164 Gallardo v. Hannah, 49 Cal. 136; Cal. Supreme Court rule 26, subd. 1.

165 Richmond v. Houser (Cal. App.), 96 Pac. 908.

166 Starkweather v. Seeley, 45 Barb. 164; Tingley v. Superior Court, 8 Cal. App. 47, 96 Pac. 20.

167 Norris v. Duncan, 21 Tex. 594.

by the district attorney in behalf of the commonwealth without such allowance or consent.[168] It cannot be used for the laying of a tax or assessment which affects a considerable number of persons, at the instance of one individual.[169] A stockholder may use the writ to question authority of court to dissolve the corporation.[170] A *certiorari* cannot be sued out by a purchaser of property who was not a party to the proceedings for seizure, as his rights are not affected thereby, he having no interest in the proceedings.[171]

§ 2007. The same—Notice.—The codes provide that notice of the application be given to the adverse party, or that the court may grant an order to show cause why it should not be allowed, or may grant the writ without notice.[172] But notice of the application must be given if a stay of the proceedings until return of the writ be desired.[172a]

§ 2008. The same—Time and laches.—A *certiorari* to the board of supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the board, as a *certiorari* is not allowed before the case is finally adjudicated below.[173] So in case of forcible entry and detainer; it is premature until there is something to remove.[174] The writ takes into consideration only such proceedings as remain before the inferior tribunal.[175] It ought not to issue after a limit of writ of error; but when a petitioner for a writ of *certiorari* was detained at home by violent sickness, and, after judgment, his counsel obtained an appeal, upon condition of his giving security for the appeal, which he failed to do, by reason of his detention at home, it was sufficient to rebut the idea of his having abandoned the right to appeal, and

168 Commonwealth v. Capp, 48 Pa. St. 53.

169 In re Mount Morris Square, 2 Hill, 16; Case of Fifty-first Street, 3 Abb. Pr. 232; Starr v. Trustees, 6 Wend. 564.

170 Cœur D'Alene Min. Co. v. Woods, 15 Idaho, 26, 96 Pac. 210.

171 People v. Overseers of Berne, 44 Barb. 467; Burnett v. Douglas County, 4 Or. 388; Canyonville etc. Road Co. v. County of Douglas, 5 Or. 280.

172 Pollock v. Cummings, 38 Cal. 685; Cal. Code Civ. Proc., § 1069, as amended 1907.

172a California Supreme Court rule 26, subd 4.

173 Wilson v. Supervisors, 3 Cal. 386; Lynde v. Noble, 20 Johns. 80; Sayers v. Superior Court, 84 Cal. 642, 24 Pac. 296; Weill v. Light, 98 Cal. 193, 32 Pac. 943; Schwarz v. County Court, 14 Colo. 44, 23 Pac. 84; Lamb v. Schottler, 54 Cal. 319.

174 Haines v. Backus, 4 Wend. 213.

175 People v. Highway Commissioners, 30 N. Y. 72.

entitled him to the writ of *certiorari*.[176] It will not lie after five years.[177] It will not lie to review an appealable order, either before or after the expiration of the time for appeal.[178]

§ 2009. **The same—The writ.**—The writ may be directed to the inferior tribunal, board, or officer, or to any other person having custody of the record or proceedings to be certified.[179] The writ should be addressed to the board, and not to the members individually, and should show that some person is aggrieved and recite his complaint.[180] A copy of the order allowing the writ should be served with it, or the allowance should be indorsed on the writ;[181] but it need not contain a recital of the error to be reviewed.[182] Several writs may issue in one case.[183] A justice of the supreme court of California cannot issue the writ, at chambers.[183a]

§ 2010. **The same—Stay of proceedings.**—A stay of proceedings may be required by the writ, or omitted in the sound discretion of the court; but unless a stay is enjoined by the writ, the power of the inferior court or officer is not suspended or the proceedings stayed.[184] The proceedings of the taxpayer in the district court, contemplated by the statute, is a proceeding by *certiorari*, in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay proceedings beyond the ten days, though probably no formal order of injunc-

176 Sharpe v. McElwee, 8 Jones L. 115; Elmendorf v. Mayor of New York, 25 Wend. 693.

177 Vaugh v. Marshall, 1 Houst. (Del.) 348.

178 Stuttmeister v. Superior Court, 71 Cal. 322, 12 Pac. 270; McCue v. Superior Court, 71 Cal. 545, 12 Pac. 615; In re McConnell, 74 Cal. 217, 15 Pac. 746; Lewis v. Gilbert, 5 Wash. 534, 32 Pac. 459; People v. District Court, 28 Colo. 218, 64 Pac. 194.

179 Cal. Code Civ. Proc., §§ 1070, 1071; Alaska Codes, pt. 4, ch. 55, § 542; Ariz. Civ. Code, par. 432; Idaho Rev. Codes, § 4964; Mont. Rev. Codes, § 7205; Nev. Comp. Laws, § 3530; N. Mex. Comp. Laws, § 2804; Or. B. & C. Codes, § 596; Utah Rev. Stats., § 3629; Wash. Bal. Codes, § 5742.

180 People v. Chalwell, 6 Abb. Pr. 151; Ex parte Mayor, 23 Wend. 277.

181 Mott v. Commissioners of Highways, 19 Wend. 640.

182 State v. Moore, 23 Wash. 276, 62 Pac. 769.

183 Matter of Woodbine St., 17 Abb. Pr. 112. For the regulations in issuing the writ in the courts of the Dakotas, see State v. Commissioners, 1 S. Dak. 292, 46 N. W. 1127, 10 L. R. A. 588; State v. Nelson Co., 1 N. Dak. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

183a Cal. Code Civ. Proc., § 165. But see, also, § 1108.

184 Cal. Code Civ. Proc., §§ 1071, 1072.

tion is necessary.[185] The writ may issue without requiring bond.[185a]

§ 2011. **The same—Return of the writ.**—When the writ is directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.[186] But when the writ is directed to the judge, a return made by the clerk is insufficient.[187] On petition for a writ of *certiorari*, the court must wait for a return in form from the court below.[188] In order to procure a reversal, it is necessary that the order should be brought up and made a part of the record.[189] A common-law *certiorari* brings up so much of the evidence as is necessary to present the question of law upon which the relator relies to avoid the decision of the inferior tribunal.[190] The statute does not require the inferior tribunal to prepare a statement of the evidence to be annexed.[191] The return must not include the evidence.[192] If the facts upon which the court below acted are not in the record, the supreme court may require the court below to certify such facts; and these facts constitute the return upon which the court acts in determining whether such tribunal exceeded its jurisdiction, or exercised its functions erroneously, to the injury of the petitioner.[193] The return is made by annexing to the writ a full transcript of the record and proceedings in the case, properly certified.[194] If it is defective, the court may order a further return.[195] The writ may be made returnable, and a hearing be had thereon at any time.[196] The return of a finding of facts made by a county judge to a writ of *certiorari* constitutes a part of the record,

185 California Northern R. R. Co. v. Butte County, 18 Cal. 671; State v. Clerk of Middleton, 24 N. J. L. 124.

185a State v. Moon, 23 Wash. 276, 62 Pac. 769.

186 Estee's Pl. & Pr., § 5379; Fraser v. Freelon, 53 Cal. 644; Onesti v. Freelon, 61 Cal. 625.

187 State v. Sachs, 3 Wash. 496, 30 Pac. 503.

188 Ex parte Dugan, 2 Wall. 134, 17 L. Ed. 871.

189 People v. Highway Commissioners, 30 N. Y. 72.

190 Baldwin v. City of Buffalo, 35 N. Y. 375. But see Hannibal etc. R. R. Co. v. State Board, 64 Mo. 294; Camden v. Block, 65 Ala. 236.

191 Central Pacific R. R. Co. v. Placer County, 34 Cal. 352; Farmers' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312.

192 Douglas County Road Co. v. Douglas County, 6 Or. 299.

193 Blair v. Hamilton, 32 Cal. 49; Poppleton v. Yamhill, 8 Or. 337; White v. Superior Court, 110 Cal. 60, 42 Pac. 480; Johnston v. Board of Supervisors, 104 Cal. 390, 37 Pac. 1046.

194 Cal. Code Civ. Proc., § 1071.

195 Cal. Code Civ. Proc., § 1075; State v. St. Louis, 67 Mo. 113; Warren v. Wilson, 63 Ga. 372.

196 Cal. Code Civ. Proc., § 1108.

though the finding is not made until the next term after the testimony is taken, and the order or judgment based on it is made.[197] A jury are no longer a legal body after their verdict is signed and they have reported, and a return to a writ signed by one of them afterwards is no return of the jury as a body or tribunal.[198]

§ 2012. **The same—Conclusiveness of the return.**—Upon a writ of *certiorari* nothing can be inquired into except what appears of record in the inferior court, and upon the return no parol testimony is allowed to establish any issue.[199] No more of the facts are required to be returned to the writ than are necessary to determine jurisdiction; and the return being deemed conclusive,[200] no evidence not included therein will be received and examined.[201] And if the minutes of the court below do not correctly show the proceedings had, an application should be made in that court to correct the same.[202]

§ 2013. **The same—Dismissal or quashing of the writ.**—Though a writ has been issued, it may be dismissed without a hearing, when, in the opinion of the court, it was improvidently issued, or where the prosecutor had a remedy by appeal, but failed to use it.[203] Where dismissal of the writ appears not to be based upon discretion, the appellate court will examine the grounds thereof, and, if found insufficient, will reverse and remand it for action on the merits, and an exercise of discretion.[204] An application for

197 Blair v. Hamilton, 32 Cal. 49; Central Pacific R. R. Co. v. Board of Equalization, 32 Cal. 582.

198 People v. Highway Commissioners, 30 N. Y. 72. In summary proceedings, see Benjamin v. Benjamin, 5 N. Y. 383. By officer after expiration of his term, see Welch v. Joy, 13 Pick. 477; King v. Sheriff, 4 East, 604; Clason v. Shotwell, 12 Johns. 31.

199 Estee's Pl. & Pr., § 5379a; State v. Kemen, 61 Wis. 494, 21 N. W. 530; In re Dance, 2 N. Dak. 184, 49 N. W. 733, 33 Am. St. Rep. 768.

200 Cusiter v. City of Silverton, 50 Or. 419, 93 Pac. 234.

201 State v. Board of Equalization, 7 Nev. 87; Alexander v. Archer, 21 Nev. 22, 24 Pac. 373.

202 De Pedrorena v. Superior Court, 80 Cal. 144, 22 Pac. 71; Farmers' Bank v. Board of Equalization, 97 Cal. 318, 32 Pac. 312; Roe v. Superior Court, 60 Cal. 93; Smith v. City of Portland, 25 Or. 297, 35 Pac. 665; Hoffmann v. Superior Court, 79 Cal. 475, 21 Pac. 862; Richmond v. Houser (Cal. App.), 96 Pac. 908.

203 Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212; Spooner v. Seattle, 6 Wash. 370, 33 Pac. 963; Phillips v. Welch, 12 Nev. 158; Crosby v. Probate Court, 3 Utah, 51, 5 Pac. 552; In re Henriques, 5 N. Mex. 169, 21 Pac. 80.

204 Champion v. Commissioners, 5 Dak. 416, 41 N. W. 639.

the writ may be defeated by laches in suing it out.[205] The writ may be quashed for insufficiency of the affidavit or petition.[206] That the writ has issued without requiring bond is no ground for quashing it.[207] Where a motion to quash the writ is filed on the return day after the return of the writ, the petition for the writ is taken to be true. The court must affirm the decision on the writ if it is correct.[208] Under certain circumstances, it is held that the writ could not be quashed on the ground of neglect and delay of the petitioner.[209] That the peremptory writ of *mandamus* has been obeyed is no ground for quashing the writ issued by the supreme court to review the action of a court in granting the *mandamus*.[210] Where the action below is dismissed by the successful party, the writ will be dismissed; or where, prior to the return of the writ from the justice of the peace court, the judgment was satisfied, and this appeared in the return, the district court erred in annulling the judgment of the justice.[211]

§ 2014. Demurrer to the writ.—Where an application for writ of review was not sufficiently specific, defendant's remedy was by motion, and not by demurrer.[212] Where the answer raises the same questions only that were passed upon in the demurrer to a petition in the supreme court, the settlement of the demurrer is a settlement of the case.[213]

§ 2015. Principles of determination.—The necessary evidence to make out a fact essential to the jurisdiction of the officer will be assumed.[214] The writ will not of necessity be dismissed when

205 Kimple v. Superior Court, 66 Cal. 136, 4 Pac. 1149; Smith v. Superior Court, 97 Cal. 348, 32 Pac. 322.

206 Knox v. Carter, 58 Tenn. (11 Heisk.) 12; Spinks v. Mathews, 80 Tex. 373, 15 S. W. 1101.

207 State v. Moore, 23 Wash. 276, 62 Pac. 769.

208 Gaston v. City of Portland, 48 Or. 82, 84 Pac. 1040.

209 Warren v. Superior Court, 144 Cal. 287, 77 Pac. 910.

210 State v. Moore, 23 Wash. 276, 62 Pac. 769.

211 State v. Laurendeau, 27 Mont. 522, 71 Pac. 754.

212 Corbett v. Civil Service Commissioners, 33 Wash. 190, 73 Pac. 1116. Demurrer held improper in Gaston v. City of Portland, 48 Or. 82, 84 Pac. 1040.

213 Carpenter v. Superior Court, 77 Cal. 291, 19 Pac. 500. See Stewart v. Superior Court, 101 Cal. 594, 36 Pac. 100.

214 People v. Soper, 7 N. Y. 428. As to testimony, see Overseers of Plattskill v. Overseers of New Paltz, 15 Johns. 305. As to error in summoning jurors, see Farrington v. Morgan, 20 Wend. 207. As to highway proceedings, see People v. Ferris, 36 N. Y. 218. As to assessors'

the action out of which the writ arose is dismissed in the lower court.[215] Cases in *certiorari* shall, after the record is brought up by the return, be subject to the same rules with respect to argument and submission as cases on appeal.[215a]

§ 2016. Costs.—Petitioner is not entitled to the enforcement of the writ without the payment of the clerk's fee imposed by statute.[216] Where the fee bill of the clerk of the supreme court makes no provision for an appearance fee in special proceedings, none can be charged in *certiorari*.[217] When printing is required by a rule of court, defendant may, on application, have costs for printing brief in *certiorari* which was dismissed; also, under provision allowing costs where *certiorari* is dismissed, the costs will be allowed to defendant on application, though the judgment awarded no costs.[218] The outlay for carrying of the return, maps, etc., should be borne by the party whose fault occasioned the expense.[219] Costs are awarded petitioner where the successful party dismisses the action; also, defendant is entitled to expense of transcribing evidence into longhand when *certiorari* is dismissed at cost of relator. But a party obtaining a reduction of a judgment on appeal from the justice's court to the district court is not entitled to costs as a matter of right.[220]

The same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case.[221] Costs must be allowed of course to the defendant, upon a decision in his favor.[222]

return to a certiorari sued out to renew a tax, see People v. Fredricks, 48 Barb. 173.

215 State v. Superior Court, 47 Wash. 35, 91 Pac. 568.

215a Cal. Sup. Ct. rule 4.

216 Cal. Code Civ. Proc., §§ 1070, 1071, and certain county acts; I. X. L. Lime Co. v. Superior Court, 143 Cal. 170, 76 Pac. 973.

217 State v. District Court, 25 Mont. 1, 63 Pac. 402.

218 State v. District Court, 24 Mont. 425, 62 Pac. 688.

219 State v. District Court, 25 Mont. 1, 63 Pac. 402.

220 State v. District Court, 27 Nev. 58, 71 Pac. 664; State v. District Court, 26 Nev. 253, 66 Pac. 743; In re Boyle, 26 Mont. 365, 68 Pac. 409, 471; State v. District Court, 26 Mont. 365, 68 Pac. 409, 471.

221 Cal. Code Civ. Proc., § 1032.

222 Cal. Code Civ. Proc., § 1024.

FORMS IN CERTIORARI.

§ 2017. Petition for writ of certiorari reviewing action of common council of city in laying out a street.

Form No. 516.

[VENUE.]

To the . . . Court of . . . County.

The petition of C. D. respectfully represents that the city of . . . , in said county, is, and was at the times hereinafter stated, a municipal corporation, organized and existing under the laws of the state of . . . , possessing the power to lay out streets and highways, and the other usual rights and powers incident to such corporations.

That the petitioner is now, and was at the dates hereinafter mentioned, a taxpayer and resident of said city, and the owner in fee simple of certain lands described as follows: [Describe property through which street is laid.]

That upon the . . . day of . . . , 19.., a petition of the required number of taxpayers of said city was presented to the common council thereof, praying for the laying out and opening of a highway in said city, described as follows: [insert description of proposed highway, showing that the same crosses the land of the petitioner]; that such proceedings were thereafter taken upon said application that twelve jurors were, on the . . . day of . . . , 19.., appointed by the . . . court to view the said premises so proposed to be taken, and determine whether it was expedient and necessary to take the same for the purposes of a street; that [set out in detail the proceedings of the jury, with their report or verdict, and the final action taken by the council thereon laying out the street]; that the said proceedings of the said common council, in form laying out the said street or highway across the petitioner's premises, were and are irregular, illegal, and void, for the following reasons: [Here state the facts showing that the proceedings were void, or outside of the jurisdiction, such as the lack of necessary answer, etc.]

Wherefore, your petitioner prays that a writ of *certiorari* may be issued out of this court to the said common council, to the end that this court may be certified of all the proceedings had in said

matter, and that the pretended resolution laying out said street or highway may be reversed and held for naught. C. D.

[Add verification as in case of a pleading.]

[Add indorsement of allowance.]

§ 2018. Petition for certiorari in aid of writ of error, alleging diminution of the record.*

Form No. 517.

[Title of action in which writ of error has issued.]

To the Honorable the Judges of the Supreme Court of the State of . . .

The petition of A. B., the plaintiff in error above named, respectfully shows and represents to the said court:

That he was indicted and convicted in the . . . court, of the county of . . . , for the murder of one S. S., and was sentenced by the said court to be imprisoned, etc.

That an application was made on his behalf to the Honorable J. K., one of the justices of the supreme court of the state of . . . , for the allowance of a writ of error, to review the record and proceedings of the said . . . court which were had in his case, also for a stay of execution under the provisions of the statutes of the state in such case made and provided, and that the said judge did stay the said execution, and allow said writ of error and made it returnable to said supreme court on the . . . day of . . . , instant, on which day a return was made by the same H. V., clerk of the said [trial court], and said writ and return were filed in the office of the clerk of said supreme court;

And your petitioner further states [that none of the matters specified in the said notice have been returned with the said writ of error, and] that there is a diminution and defect in the return made to the said writ of error, of the following matters and things, all of which constitute a part of the record of the said [trial court] in the case of your petitioner, and which he is advised should be returned according to law, and the return of which are essential and necessary to enable this court to correct and redress the errors which it is alleged have happened in the said [trial court] in the trial and proceedings had in the case of your petitioner;

* California Supreme Court Rule xiv provides for the correction of errors and defects in the transcript by suggestion in writing, supported by affidavit or by a certified copy of the omitted record, upon which an order issues to the proper clerk to certify the record required.

And your petitioner specifies the diminution in the matters returned in obedience to the requirement of the said writ of error, to be as follows: [Designating each matter.]

Your petitioner, therefore, asks that a writ of *certiorari* may be issued by this court, directed to the said clerk of the said [trial court], requiring him to certify to the said supreme court the diminution of the record and proceedings of all the matters specified and enumerated in this petition, and that the said clerk be directed to return the same to this court, according to the command of the writ.

[VERIFICATION.] A. B.

§ 2019. Indorsement of allowance.

Form No. 518.

The foregoing writ of *certiorari* is allowed according to its terms, but without prejudice to any question, and we direct that the same be sealed and signed by the clerk of the supreme court.

[DATE.]

By the Court: J. K., Judge.

§ 2020. Petition for writ of review.

Form No. 519.

In the Supreme Court of the State of California.

To the Honorable, the Judges of the Supreme Court of California:

The petition of . . . respectfully represents:

1. That heretofore, to wit, on the . . . day of . . . , 19 . . , a complaint was made and filed in and with the clerk of the police court of the city and county of San Francisco, state of California, and in Department No. . . . thereof, in which . . . then presided and still presides as the judge thereof, of which complaint the following is a copy:

[TITLE OF COURT AND CAUSE.]

[Then set out in full the complaint, or other proceeding, part or all of the subject, etc., to be reviewed, including verification, if any, indorsements and record marks.]

That under and on said complaint process was duly issued, and petitioner [who is the defendant in said complaint named] arrested and brought before said court and department, and the

matter of said complaint against him set for trial therein. On the . . . day of . . . , 19 . . , the said matter of said complaint came on for trial in said court and department and before said . . . , as the judge thereof, and petitioner having challenged the sufficiency of said complaint as not showing that any public offense had been by him committed, and that challenge having been by said court and judge thereof then and there denied (and it was so denied), pleaded not guilty to the charge in said complaint made. Thereupon the trial of petitioner upon said charge in said complaint made was had in said court and before said judge thereof (a jury trial having been waived), and, after hearing the evidence introduced (and evidence was so introduced) against and by petitioner, the said court and judge thereof found and adjudged [give the judgment rendered]. Said finding and sentence were thereupon duly entered in said police court as the judgment thereof in the said matter of said complaint against this petitioner.

2. Thereafter, to wit, on the . . . day of . . . , 19 . . , petitioner served upon the district attorney of said city and county, and filed with the clerk of said police court and department thereof, his (petitioner's) notice of appeal to the superior court of said city and county of San Francisco from and to the effect that he did appeal to said superior court from said judgment of said police court and from the whole thereof. That thereafter, to wit, on the . . . day of . . . , 19 . . , the petitioner prepared and the said judge of said police court settled and allowed and filed with the clerk of said police court, the statement of said case against petitioner in said police court required, and as required by law, and of which said statement the following is a copy:

[TITLE OF COURT AND CAUSE.]

[Then set out the statement of the case above referred to, and ordinance, statute, order, etc., to which objection is made.]

Immediately upon conviction defendant made a motion for a new trial upon the grounds, first, that the verdict of the court (a jury trial having been waived) is contrary to the evidence; and also upon the ground, second, that the verdict is contrary to law. Motion denied. Exception taken.

On the . . . day of . . . , 19 . . , defendant was, upon said conviction sentenced, etc. The evidence established the facts to be as follows:

[Set out the facts in full, and omit all evidence upon which the facts depend.]

. . . Attorney for Defendant.

[Then insert the judge's certificate settling the statement.]

That all of said matters so contained in said statement of the case are true, and are herein repeated and affirmed, and prayed to be taken and considered as herein newly and independently pleaded as part of this petition for a writ of review.

3. That thereupon the said appeal of petitioner to said superior court from said judgment of said police court, was duly perfected as by law required, and the record thereof on such appeal by law provided sent to and filed in said superior court.

4. Thereafter the said appeal and the matter thereof were presented and heard in and by said superior court, and before three judges thereof sitting in bank, this petitioner (there the appellant) challenging variously and fully the validity of said ordinance upon which said complaint in said police court was based, and asking that said judgment of said police court be reversed and said complaint against petitioner dismissed. Nevertheless the said superior court, so sitting in bank as aforesaid, thereafter, to wit, on the . . . day of . . . , 19 . . , rendered its judgment on said appeal, affirming, and whereby it affirmed, said judgment of said police court.

5. That thereupon a copy of the order of said superior court affirming said judgment of said police court was remitted to said police court and filed with the clerk thereof, and thereafter, to wit, on the . . . day of . . . , 19 . . , said police court and said . . . , as the judge thereof, made and entered an order therein in the matter of the said complaint against this petitioner that said judgment of said police court of the . . . day of . . . , 19 . . , having been by said superior court affirmed on appeal to it, be carried into effect, and that petitioner pay said fine of . . . dollars, or be imprisoned in said county jail for a period of . . . days, unless said fine had been sooner paid.

Said judgment now exists as above stated, not reversed, vacated, nor set aside, and said fine has not been paid nor said term of imprisonment yet enforced.

Said superior court, in rendering its decision on said appeal made to it as aforesaid, suggested and recommended that the questions of law therein and here involved and raised be pre-

sented to and passed upon by this court under a writ of review, as is hereinafter prayed.

And petitioner now says and represents to this court that said police court, and said . . ., as the judge thereof, have, in rendering and entering said judgment against petitioner, acted without and in excess of the jurisdiction of said court and judge, in that the matters stated in and charged by said complaint to have been committed by this petitioner were not, and do not, constitute a public or criminal or other offense—the ordinance of the board of supervisors of said San Francisco, purporting to make the [state the act constituting the crime] in said San Francisco such an offense, and under the provisions of which said complaint was made, and said judgment given being invalid and beyond the power of said board of supervisors to enact, especially in this:

a. The power and jurisdiction in said ordinance attempted to be exercised has not been, by constitution or statute, granted to said board of supervisors, nor is it inherent in said board as a municipal corporation or otherwise.

b. Said ordinance is in conflict with the general laws of this state.

c. Said ordinance is unreasonable, in that it would operate an unnecessary restriction upon the [here state fully and separately how the law would operate to injure the person or property of the petitioner, and conclude as follows]:

Petitioner further says that he has exhausted his right of appeal from said judgment of said police court and judge thereof without redress, as hereinbefore stated; and that said judgment and sentence thereunder will be carried into effect and petitioner fined or imprisoned as said judgment requires, unless said judgment and proceedings leading thereto be reviewed by this court.

Petitioner applies to this court in the first instance for such review, because the superior court of said city and county of San Francisco has, while sitting in bank on the said appeal as aforesaid, passed upon all the questions of law involved in the review here sought, adversely to petitioner, and an application in the first instance to said superior court for a writ of review of said judgment and proceedings of said police court and judge thereof would be an idle and useless proceeding.

Petitioner therefore prays that said . . . , as the judge of said police court and department thereof, be by the court required to certify to this court at a specified time and place a full transcript

of the record and proceedings leading up to and including said judgment and sentence thereunder for review herein, and that thereupon the court review and annul the same. Also, that the said sentence and proceedings thereunder be in the mean time stayed.

[Add verification.]

§ 2021. Notice of petition for writ of certiorari.

Form No. 520.

[TITLE.]

Take notice, that on the verified petition of C. D., of which the within is a copy [or, of which a copy is annexed], the undersigned will move the . . . court of . . ., at a special term to be held at . . ., on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for the allowance of a writ of *certiorari* [here state the object—e. g. thus:] requiring you [name body or officer] to certify and return the record and proceedings [or, a transcript of the record and proceedings] in that certain action lately pending before you [describe same; or, in that certain proceeding before you—describe proceedings with certainty].

[DATE.] G. H.

To [name officer or board].

§ 2022. Undertaking to stay execution on certiorari.

Form No. 521.

[TITLE.]

Whereas, C. D. has applied for and obtained a writ of *certiorari*, directed to L. M., commanding him to certify to the . . . court of . . . county, state of . . ., the judgment, together with all the files, entries, and papers used or made in the action wherein A. B. was plaintiff, and C. D. defendant, which judgment was rendered on the . . . day of . . ., 19 . ., for the sum of . . . dollars damages, and . . . dollars costs, in favor of said A. B., and against said petitioner:

Now, therefore, we, N. O., of . . ., and O. P., of . . ., do hereby undertake that if the said writ shall be quashed or superseded, or if the judgment shall be affirmed and execution thereon be returned unsatisfied, in whole or in part, we will pay the amount unsatisfied.

Dated this . . . day of . . ., 19.. N. O.

[JUSTIFICATION.] O. P.

Approved as to form and sufficiency of sureties, this . . . day of . . . , 19 . .
J. K., Judge.
[Or, A. M., Justice of the Peace.]

§ 2023. Writ to review acts of police court.

Form No. 522.

[TITLE OF COURT AND CAUSE.]

On reading and filing herein the petition of . . . for a writ of review to be issued by this court to . . . as judge of the police court of the city and county of San Francisco, state of California, requiring him to certify to this court a transcript of the record and proceedings in the matter of the "People etc. v. . . . ," in said petition mentioned, on the ground therein stated that in said proceedings against said . . . the said police court and judge thereof acted without and in excess of their jurisdiction, it appearing from said petition that the writ therein prayed for should be issued;

It is ordered that a writ issue out of and under the seal of this court addressed to . . . , as judge of the police court of the city and county of San Francisco, state of California, commanding him to certify and return to this court at its session in said city and county of San Francisco on the . . . day of . . . , 19 . ., at . . . o'clock . . . M., a full and complete transcript of the record, judgment, and proceedings in that certain matter pending in said police court, entitled "People of the State of California v. . . . ," to the intent that the same be reviewed by this court as to said claim of said petitioner that said proceedings and judgment in said matter were without, or in excess of, the jurisdiction of said police court and of said judge thereof.

§ 2024. Writ of certiorari to review removal of officer.

Form No. 523.

[VENUE.]

The State of . . . to the Board of Police Commissioners of the City of . . .

Whereas, it has been represented to us by the verified petition of C. D., that lately before you, or a majority of you, composing at the time the board of police commissioners of, etc. [name body], such proceedings have been had that you, or a majority of you, have irregularly and without authority or jurisdiction in the

premises, discharged, dismissed, and removed from office R. G., a policeman, duly appointed and holding office in the said city; and whereas, it is alleged by said R. G., that your proceedings have been irregular, without authority, and in violation of the provisions of law, in this: [State specifically the violations alleged.]

And being willing for certain reasons that all the proceedings concerning said dismissal, discharge, and removal from office of said R. G. before you remaining, with all the proceedings thereto appertaining, should be certified and returned by you, into our said court, at a general term of said court, to be held at . . . , in . . . , on the . . . day of . . . , next:

We do command you, that you certify and return into our said court, at a general term of said court, to be held at the place, and on the day last aforesaid, at the opening of the court on that day, a correct transcript of all the proceedings concerning the said dismissal, discharge, and removal from office of the said R. G., had, and taken by, and remaining before you, so that our said court may further act thereon, as of right and according to law ought to be done. And have you then and there this writ.

Witness, Hon. J. K., judge of our said . . . court, at . . . , in . . . , the . . . day of . . . , 19..

By the Court: R. S., Clerk.

[Indorse allowance.]

§ 2025. Writ to review acts of a board of supervisors.

Form No. 524.

[TITLE.]

The People of the State of California to the Board of Supervisors of the County of . . .

Whereas, it has appeared to us, by the affidavit of . . . , that lately before you, or a majority of you, composing at the time the board of supervisors of the county of . . . , such proceedings have been had that you, or a majority of you, have irregularly, and without authority or jurisdiction in the premises, [state concisely what has been done, and in such manner as to show that the person making the affidavit has been affected].

And whereas, it is alleged by said . . . that your proceedings therein have been irregular, without authority, and in violation of [naming the statute and the particular section alleged to be violated, and in what the violation consists; or, if a violation of

rules adopted by the board is relied upon, set out a copy of the rules].

And we being willing that your said proceedings in the premises, and appertaining thereto, should be certified and returned by you into our supreme court, before our justices thereof, at a term of said court to be held at . . . , in . . . , on the . . . day of . . . next, do command you that you certify and return into our supreme court, before our said justices thereof, at a term of said court to be held at the place and on the day last aforesaid, at the opening of court on that day, all the proceedings concerning the said [removal from office, or other act complained of], and taken by and remaining before you, so that our said court may further act thereon, as of right and according to law ought to be done; and have you then and there this writ.

Witness, . . . , chief justice of our said supreme court, at this . . . day of . . . , 19..

By the Court: . . . , Clerk.

§ 2026. Writ to review acts of superior court.

Form No. 525.

[TITLE.]

The People of the State of California to the Superior Court of the County of . . .

Whereas, it manifestly appears to us by the affidavit of . . . , the party beneficially interested, that in a certain action pending before you, against . . . , at the suit of . . . , you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being therefore willing to be certified of the said action or proceeding:

We therefore command you, that you certify and send to our supreme court, at the courtroom thereof, in the city of . . . , on the . . . day of . . . , 19.., annexed to the writ, a transcript of the record and proceedings in the action aforesaid, with all things touching the same, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our supreme court, and that our supreme court may further cause to be done thereupon what it may appear of right ought to be done; and in the mean time we command and require the said superior court of the county of . . . to desist

from further proceedings in the matter so to be reviewed, and that execution be stayed in said cause.

Witness, . . . , chief justice of our supreme court, at . . . , this . . . day of . . . , 19..

By the Court: . . . , Clerk.

§ 2027. Return thereto.

Form No. 526.

Pursuant to a writ of *certiorari* hereunto annexed, the undersigned, clerk of the . . . court of . . . county, hereby returns to the supreme court of the state of . . . [here designate the papers annexed].

Given under my hand, and attested by the seal of the court, this . . . day of . . . , 19..

[SEAL.] . . . . , Clerk.

§ 2028. Return of justice to writ, general form.

Form No. 527.

The execution of the within writ appears by the following schedule.

L. M., Justice of the Peace.

SCHEDULE.

[VENUE.]

I, L. M., justice of the peace of the . . . township, of the county of . . . , in pursuance of the command of the within writ, to me directed, do hereby certify and return to the . . . court of . . . county, that on the . . . day of . . . , 19.., upon the application of A. B., I issued a summons [or, upon the affidavit of A. B., I issued a warrant] directed to the sheriff or any constable of the county of . . . , and delivered the same to [name officer], a true copy of which summons [or, warrant] so issued is attached hereto, marked exhibit A, and made part of this return; that thereafter said summons [or, warrant] was returned to me with a return of service indorsed thereon, a copy of which return is attached hereto, marked exhibit B, and made a part of this return; that on the return day of said summons the parties appeared at my office [here state appearance of parties according to fact].

That all the proceedings in said action required by law to be entered in my docket were duly entered therein, and that a true copy of said docket entries is hereto annexed, marked exhibit C, and made part of this return.

That true copies of the written pleadings made and filed in said cause, and referred to in said docket, are hereto annexed, marked, respectively, exhibits D and E, and that the judgment entered is shown in said docket.

I further certify and return that attached hereto are true copies of all papers filed in said action, marked, etc.

Which said transcript of the process, pleadings, docket entries, and papers filed in said action are sent in obedience to said writ, and I certify that I have compared the same with the originals thereof, and that each of the copies sent herewith is a true copy of the original and of the whole thereof and the indorsements thereon.

Given under my hand, this . . . day of . . . , 19..

L. M., Justice of the Peace.

§ 2029. Return by city clerk to writ of certiorari.

Form No. 528.

[VENUE.]

I, L. M., city clerk of the city of . . . , pursuant to the command of the within writ of *certiorari*, to me directed, do hereby certify and return to the . . . court of . . . county:

That the board of review of said city, consisting of [name officers], met at [name place and time], pursuant to law, and that I, as city clerk of said city, acted as clerk of said board, and kept a full and true record of its proceedings, a true copy of which record so kept is attached hereto and made a part of this return, and marked exhibit A; that I also kept a record of all testimony taken before said board in the matter of the assessment of the property of C. D., the relator, and that a true copy of said testimony with a true copy of the decision of said board of review thereon is attached hereto and made part of this return, and marked exhibit C.

That I have carefully compared all of said copies of said record, proceedings, testimony, and decision with the originals on file in my office, and that the same constitute a full, correct, and complete

transcript of the record and proceedings in the matter referred to and described in said writ.

Given under my hand this . . . day of . . ., 19..

L. M., City Clerk.

§ 2030. Judgment of affirmance or reversal on certiorari to justice of the peace.

Form No. 529.

[TITLE.]

This action coming on to be heard upon the return of [name officer] to the writ of *certiorari* issued herein . . ., 19.., the said relator appearing by G. H., Esq., his attorney, and the said respondent [or, defendant in error] by E. F., Esq., his attorney, the court being now fully advised in the premises, and it appearing that the judgment rendered by L. M., Esq., justice of the peace, on the . . . day of . . ., 19.., in favor of said respondent, and against said relator, for . . . dollars damages, and costs, in that certain action then pending before said justice, wherein said respondent was plaintiff and said relator defendant, is manifestly good and valid in law [or, void, because rendered without jurisdiction]:

It is adjudged, that said judgment be and the same is hereby in all things affirmed [or, reversed], and that the said . . . recover of the said . . . his costs and disbursements herein, taxed at . . . dollars.

By the Court: R. S., Clerk.

§ 2030a. Judgment quashing writ.

Form No. 529a.

[TITLE.]

The motion of the respondent [or, defendant in error] to quash the writ of *certiorari* issued herein to L. M., justice of the peace, dated . . ., 19.., coming on to be heard, G. H., Esq., appearing for the motion, and E. F., Esq., in opposition, and the court being advised in the premises:

It is adjudged, that said writ be and the same is hereby quashed, and that the said respondent do recover of the said relator the sum of . . . dollars, costs and disbursements in this action as taxed.

By the Court: R. S., Clerk.

CHAPTER LXXIII.

EXECUTION.

§ 2031. Enforcement of judgment.—The court has no power to order the sheriff to levy upon a particular piece of property, even though it decide that such property is not exempted.[1] But the court may order the execution of a writ of possession,[2] or the execution of an order of sale on foreclosure.[3] An execution must be warranted by the judgment. If it exceed the judgment, it has no validity; therefore, to authorize an arrest on execution for fraud, the fraud must be stated in the judgment.[4] But the mere fact that an execution directs the levy of more money than the judgment calls for does not render the execution void, but only voidable.[5] The application for enforcement of a judgment more than five years (to-wit: thirteen years) after its entry is not an action or special proceeding, but a motion in the original action, to which limitations do not apply, and, also, notice thereof is not required.[6]

§ 2032. Execution for deficiency on sale.—Five years of limitation, within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, runs from the date when the balance was docketed. The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance.[7] Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died, it was held that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency.[8]

1 Fraser v. Thrift, 50 Cal. 476. See Frink v. Roe, 70 Cal. 296, 11 Pac. 820.

2 Leese v. Clark, 29 Cal. 665.

3 Société d' Epargnes etc. v. McHenry, 49 Cal. 351.

4 Davis v. Robinson, 10 Cal. 411.

5 Hunt v. Loucks, 38 Cal. 372, 99 Am. Dec. 404. See Cal. Code Civ. Proc., § 684.

6 Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330; Water Supply Co. v. Sarnow, 6 Cal. App. 586, 92 Pac. 667.

7 Bowers v. Crary, 30 Cal. 621.

8 Cowell v. Buckelew, 14 Cal. 640.

§ 2033. Irregular issuance.—Where an execution was directed to the sheriff of K. county on a judgment of a court of that county, but was delivered to and executed by the sheriff of C. county, the defect was merely an irregularity, and subject to amendment.[9] An execution not issued in the name of the people, or directed to the sheriff, is amendable, and therefore not void, but voidable, and a sale under it is valid.[10] So if it erroneously state the date of the judgment, the sheriff is justified in enforcing it.[11] The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.[12]

§ 2034. Levy, effect of.—A levy under an execution, upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor; and the release of the property from levy thus made, without consent of the parties thus liable, cannot revive their liability;[13] otherwise, if the court orders that the judgment be not enforced; there the order releases the levy, and the judgment is not satisfied.[14] In Nevada, it has been held that if the judgment creditor became the purchaser at an execution sale, and refused to pay the amount of his bid, and the property had to be resold, the first sale was not a satisfaction.[15] Issuance and levy of a second execution does not waive rights acquired by levy under a former execution.[16]

§ 2035. Levy, how made.—A levy on personal property, capable of manual delivery, must be made by taking the property in custody.[17] A levy may be good as against the defendant in

9 Christy v. Springs, 11 Okla. 710, 69 Pac. 864.

10 Hibberd v. Smith, 50 Cal. 511. See, also, Van Cleave v. Bucher, 79 Cal. 600, 21 Pac. 954; Flint v. Phipps, 20 Or. 340, 23 Am. St. Rep. 124, 25 Pac. 725; Jones v. Dove, 7 Or. 467; Pederson v. Lease, 48 Wash. 253, 125 Am. St. Rep. 922, 93 Pac. 439.

11 Franklin v. Merida, 50 Cal. 289.

12 Gregory v. Ford, 14 Cal. 143, 73 Am. Dec. 639. As to relief from irregular issuance and from void execution, consult Ryan v. Daly, 6 Cal. 239; Solomon v. Maguire, 29 Cal. 227; Domec v. Stearns, 30 Cal. 114; Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545.

13 People v. Chisholm, 8 Cal. 30; Mulford v. Estudillo, 23 Cal. 94. See Wright v. Young, 6 Or. 87.

14 Mulford v. Estudillo, 32 Cal. 131. See, also, Barber v. Reynolds, 44 Cal. 519.

15 Sweeney v. Hawthorne, 6 Nev. 130.

16 Water Supply Co. v. Sarnow, 6 Cal. App. 586, 92 Pac. 667.

17 Dutertre v. Driard, 7 Cal. 549;

the writ, and not good as to third persons.[18] As to third persons, there can be no levy when the officer does not know the subject of the levy; as where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession.[19] Where a judgment debtor owns only an interest in a small, well-defined portion of a large tract, a levy upon his interest in the large tract is at least extremely irregular.[20]

§ 2036. Return of sheriff.—A purchaser at sheriff's sale does not depend in any respect for his title upon the return of the sheriff. He is only bound to see that there is a judgment which is not void and an execution which is regular upon its face; and the acts of the officer may be presumed to be regular,[21] the statute being directory so far as it deals with the manner in which the officer is required to execute the writ.[22] Moneys collected on execution are usually paid over by the officer before the return of the writ, and the fact of such payment constitutes a part of the return, and, if paid, the amount collected and paid over cannot be the measure of damages for a subsequent failure to return the writ, where the gravamen of the action is the failure to return an execution within the prescribed time.[23]

§ 2037. Return, amendment of.—Courts should exercise great liberality in allowing sheriffs to amend their returns, so as to make them conform to the true state of facts, and to correct errors and mistakes;[24] but they cannot be amended so as to postpone rights of creditors attaching subsequently but before the correction.[25] The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it.[26]

Powell v. McKechnie, 3 Dak. 319, 19 N. W. 410.

18 Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610.

19 Herron v. Hughes, 25 Cal. 563. See, as to levy, Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475. As to duty of sheriff where the money is in custody of a corporation, see Howe v. White, 49 Cal. 658.

20 Logan v. Hale, 42 Cal. 646.

21 Blood v. Light, 38 Cal. 653, 99 Am. Dec. 441.

22 Blood v. Light, 38 Cal. 654, 99 Am. Dec. 441.

23 Hoag v. Warden, 37 Cal. 523.

24 Gavitt v. Doub, 23 Cal. 78.

25 Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 Cal. 25, 68 Am. Dec. 287. That the court can annul a return which shows that the sheriff has applied one execution in payment of another in his hands, see McGregor v. Wells etc. Co., 1 Mont. 142.

26 Low v. Adams, 6 Cal. 277.

§ 2038. **Return conclusive.**—A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion;[27] for the presumptions are in favor of the regularity of the acts of the officers.[28] Courts cannot know an under-officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.[29]

§ 2039. **Stay of execution.**—Stay of execution is within the discretion of the judge, and refusal to impose terms is not error, in absence of abuse of discretion, but on motion for new trial security must be required.[30] A judge at chambers has authority to order a suspension of proceedings under an execution until a motion before the court to recall or quash it can be heard.[31] If a judgment upon which an execution issues, and the execution itself, are void upon their face, the court has power, on motion, to afford relief, and can arrest the process.[32] When land is levied on under execution against one other than the holder of the legal title, the latter is entitled to a temporary injunction restraining the sale.[33]

§ 2040. **When execution may issue.**—The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.[34] The statute does not require the docketing of the judgment to precede either the issuing or service of an execution.[35] As soon as the judgment is entered an execution may issue, whether

27 Egery v. Buchanan, 5 Cal. 56; compare Snyder v. Clark, 100 Cal. 414, 34 Pac. 1034; Baker v. Bucher, 100 Cal. 214, 34 Pac. 654, 849.

28 Ritter v. Scannell, 11 Cal. 248, 70 Am. Dec. 775.

29 Joyce v. Joyce, 5 Cal. 449; Rowley v. Howard, 23 Cal. 401.

30 State v. Clements, 37 Mont. 96, 127 Am. St. Rep. 701, 94 Pac. 837, 95 Pac. 845.

31 Sanchez v. Carriaga, 31 Cal. 170. As to undertaking to stay execution, see McMillan v. Hayward, 84 Cal. 85, 24 Pac. 151; Frevert v. Swift, 19 Nev. 400, 13 Pac. 6. As to when judgment may be stayed by appeal, see Cal. Code Civ. Proc., § 943, as amended 1897.

32 Sanchez v. Carriaga, 31 Cal. 170. See, also, Mokelumne Hill etc. Co. v. Woodbury, 10 Cal. 188; Isaac v. Swift, 10 Cal. 71, 70 Am. Dec. 698; Farmer v. Rogers, 10 Cal. 335; Logan v. Hillegass, 16 Cal. 200; Maton v. Eder, 6 Cal. 60.

33 Einstein v. Bank of California, 137 Cal. 47, 69 Pac. 616.

34 Cal. Code Civ. Proc., § 681; N. Y. Code Civ. Proc., § 1375.

35 Hastings v. Cunningham, 39 Cal. 137.

the judgment-roll has been made up or not.[36] Every process which may be required to completely enforce a judgment must be taken within five years after its entry,[37] unless execution thereon has by order of court or operation of law been stayed for any time, which time must be excluded from the computation of the five years.[38] It applies as well to justices' judgments,[39] and to judgments of foreclosure of mortgage equally with personal judgments,[40] or for an unsatisfied balance on foreclosure.[41] The period during which an execution has been stayed by an order of court was not formerly excluded from the five years after the lapse of which an order of court was necessary to obtain an execution.[42]

§ 2041. Who may issue.—The clerk can also issue execution for damages and costs.[43] So where a case is remitted from the supreme court to a district court, the clerk of the latter may issue an execution for the costs accrued thereon, without the order of the district court; nor can the district court prevent the immediate execution of the judgment.[44] The issuing of an execution is not such an act as requires the direct agency of the attorney in the case, but may be ordered by the plaintiff himself.[44a] An execution may be directed to the sheriff or to any constable in the county.[44b] It should issue to the officer who has seized goods

36 Sharp v. Lumley, 34 Cal. 611.

37 Bowers v. Crary, 30 Cal. 621. See, also, Rowe v. Blake, 99 Cal. 171, 37 Am. St. Rep. 45, 33 Pac. 864; McMann v. Superior Court, 74 Cal. 106, 15 Pac. 448; Dorland v. Smith, 93 Cal. 120, 28 Pac. 812; Buell v. Buell, 92 Cal. 393, 28 Pac. 443; Dorland v. Hanson, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552; Cortez v. Superior Court, 86 Cal. 274, 21 Am. St. Rep. 37, 24 Pac. 1011; Los Angeles Co. Bank v. Raynor, 61 Cal. 145.

38 Cal. Code Civ. Proc., § 681, as amended 1907.

39 White v. Clark, 8 Cal. 513.

40 Stout v. Macy, 22 Cal. 647.

41 Bowers v. Crary, 30 Cal. 621.

42 Solomon v. Maguire, 29 Cal. 227. As to suspension of the running of the statute, see Dorland v. Hanson, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552; Buell v. Buell, 92 Cal. 393, 28 Pac. 443. As to leave to issue execution, see Pursel v. Deal, 16 Or. 295, 18 Pac. 461; Northern etc. R. R. Co. v. Bender, 13 Mont. 432, 34 Pac. 848; Eddy v. Coldwell, 23 Or. 163, 37 Am. St. Rep. 672, 31 Pac. 475. As to issue of execution after death of judgment debtor, see Barrett v. Furnish, 21 Or. 17, 26 Pac. 861; Bower v. Holladay, 18 Or. 491, 22 Pac. 553; Weaver v. Pickard, 7 Utah, 296, 26 Pac. 581. That execution cannot issue pending an appeal, see McCoy v. Wilson, 8 Colo. 335, 7 Pac. 298.

43 McMillan v. Vischer, 14 Cal. 232.

44 City of Marysville v. Buchanan, 3 Cal. 213. See, as to issuance in another county, People v. Doe, 31 Cal. 220.

44a Jones v. Spears, 56 Cal. 163.

44b Ross v. Wellman, 102 Cal. 1, 36 Pac. 402.

under a writ of attachment.[44c] The fact that the execution was directed to a constable, and the return thereof shows that it was received and executed by the sheriff, is at most an irregularity, and does not render the service void.[44d] After the entry of a decree for the foreclosure of a lien, the execution for the sale of the property must conform to the order of the court.[45]

§ 2042. Writ, how executed.—The statute is directory, so far as it deals with the manner in which the officer is required to execute the writ;[46] and hence, although the failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void.[47] Failure to exhibit his authority for levying an execution does not invalidate the levy.[48] Although an officer may be negligent in holding possession under the writ, the lien will not be invalidated in the absence of complicity in such negligence on the part of the judgment creditor.[49]

§ 2043. Exemption from execution a personal right.—The exemption of property from sale on execution is a personal right, which the debtor may waive or claim at his election.[50] However, the statutes of exemption are enacted on the ground of public policy for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence,[50a] and a law established for public reason cannot be contravened by a private agreement.[50b] A mere disclaimer of ownership at the time of a first levy, which was dissolved, will not estop a person from claiming the property as exempt at the time of a second levy.[51]

44c Pecotte v. Oliver, 2 Idaho, 251, 10 Pac. 302.

44d Ross v. Wellman, 102 Cal. 1, 36 Pac. 402.

45 Norton v. Reardon, 67 Kan. 302, 100 Am. St. Rep. 459, 72 Pac. 861.

46 Smith v. Randall, 6 Cal. 50, 65 Am. Dec. 475; Hayden v. Dunlap, 3 Bibb. 216.

47 San Francisco v. Pixley, 21 Cal. 59; Blood v. Light, 38 Cal. 649, 99 Am. Dec. 441. See Cal. Code Civ. Proc., § 691.

48 Mayhew v. Smith, 42 Colo. 534, 95 Pac. 549.

49 Hereford v. Benton, 20 Colo. App. 500, 80 Pac. 499.

50 Borland v. O'Neal, 22 Cal. 504; Stanton v. French, 83 Cal. 194, 23 Pac. 355; Keybers v. McComber, 67 Cal. 395, 400, 7 Pac. 838. As to what property is exempt from execution, see Cal. Code Civ. Proc., § 690, as amended 1907. As to exemption of homestead, see Cal. Civ. Code., § 1240.

50a Holmes v. Marshall, 145 Cal. 777, 778-94, 104 Am. St. Rep. 86, 79 Pac. 534.

50b Cal. Civ. Code, §§ 3268, 3513.

51 Coey v. Cleghorn, 10 Idaho, 166, 109 Am. St. Rep. 199, 79 Pac. 72.

§ 2044. **Household furniture.**—The fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family is no objection. Such a construction of the statute would be too narrow.[52]

§ 2045. **Life-insurance policy.**—The party claiming that a life-insurance policy, under the statute of California, is exempt from execution, must show that the policy was issued by a company incorporated under the laws of that state, and that the benefits which he expects to derive from the policy are such as might have been secured by the payment of an annual premium not exceeding five hundred dollars.[53] And an endowment policy is an insurance on life, within the sense of the statute. Under section 690 (subd. 18) of the California Code of Civil Procedure, the exemption applies to policies in all life-insurance companies, whether incorporated under the laws of the state or not, if the annual premiums do not exceed five hundred dollars.

The exemption under the California statute extends to the beneficiary, and exempts insurance money received by a surviving wife from liability for her debts.[54] An endowment policy having a present cash surrender value is exempt under the Washington statute.[55]

§ 2046. **Teams, teamsters, etc.**—A teamster, in the sense of the statute, is one engaged in the business of teaming or hauling freight for other persons for a consideration, by which he habitually supports himself and family, if he has one. While he need not drive his team in person, he must be personally engaged in the business, and for the purpose of making a living. One who occupies his time in some other business or calling, and purchases a team, and also carries on the business of teaming by the employment of others, is not a teamster in the sense of the statute.[56] The horses, etc., exempt to a farmer do not include a stallion

52 Haswell v. Parsons, 15 Cal. 266, 76 Am. Dec. 480; Barhyte v. New Hampshire etc. Co., 66 Kan. 390, 71 Pac. 837. As to when exemption may be claimed, see same authorities; also, Cal. Code Civ. Proc., § 690, subd. 2.

53 Briggs v. McCullough, 36 Cal. 542.

54 Holmes v. Marshall, 145 Cal. 777, 104 Am. St. Rep. 86, 79 Pac. 534, 69 L. R. A. 67.

55 Wash. Bal. Codes, § 5336; Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533.

56 Brusie v. Griffith, 34 Cal. 306, 91 Am. Dec. 695.

kept for the service of mares.[57] But a wagon and horses which are exempt are none the less so because the debtor owns an undivided interest in common with a stranger.[58]

§ 2047. **Property in third person—Estate in land.**—The purchaser of real estate at execution sale, both before and after the period for redemption expires, has an estate in the land purchased, which may be levied on and sold on an execution running against his property.[59]

§ 2048. **Joint property.**—Where the execution debtor owns property jointly with another, a sheriff who has such execution has the right to levy on such property and take it into possession for the purpose of subjecting it to sale.[60]

§ 2049. **Liability of sheriff.**—Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond.[61]

§ 2050. **Money in bank.**—Where negotiable certificates of deposit have been issued to the depositor, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten.[62]

§ 2051. **Pledgee.**—While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by seizure of the pledge.[63]

§ 2052. **Property in custody of the law.**—Property in the custody of the law is not liable to seizure without an order from

57 Robert v. Adams, 38 Cal. 383, 99 Am. Dec. 413.

58 Servanti v. Lusk, 43 Cal. 238.

59 Page v. Rogers, 31 Cal. 293. As to levy on pre-emption claim, see Kenyon v. Quinn, 41 Cal. 325.

60 Waldman v. Broder, 10 Cal. 378. See Veach v. Adams, 51 Cal. 609. As to property not segregated, see Adams v. Gorham, 6 Cal. 68. See, also, Bernal v. Hovious, 17 Cal. 542, 79 Am. Dec. 147; Jones v. Thompson, 12 Cal. 196. As to cases where title to property was held to be in third person by assignment and otherwise, see Swanston v. Sublette, 1 Cal. 123; Bryan v. Sharp, 4 Cal. 351; Eldridge v. See Yup Co., 17 Cal. 44; Peterie v. Bugbey, 24 Cal. 423.

61 Van Pelt v. Littler, 14 Cal. 194; Markley v. Rand, 12 Cal. 275.

62 McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 665.

63 Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770. See Williams v. Gallick, 11 Or. 337, 3 Pac. 469.

the court having charge thereof.[64] A sheriff cannot levy upon money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor.[65] But, it seems, funds in the hands of a receiver, in a suit for dissolution, are subject to attachment at any time before a final decree of dissolution and distribution.[66] Property taken from an officer under a writ of replevin, and returned to him under a redelivery bond is in *custodia legis*, and not subject to execution.[67]

§ 2053. **Choses in action.**—Things in action are such property as may be levied upon on execution.[68]

§ 2054. **Reclamation district.**—Since a reclamation district has no right to acquire property except to carry on the work of reclamation and matters incidental thereto, property devoted to such purposes is not subject to levy on a judgment against the district [69] The lands of a district are not exempt as quasi-public, but if valueless for irrigation, on account of change of plan, they are exempt.[70]

§ 2055. **Coin.**—Coin held in the hand, like a horse held by the bridle, may be levied upon.[71]

§ 2056. **Counties, suits against.**—An execution levied upon a county's revenues in the hands of the treasurer is illegal and void.[72] The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county.[73]

§ 2057. **Contingent interests.**—Contingent and complicated contracts cannot be levied upon and sold without being in the

64 County of Yuba v. Adams, 7 Cal. 35.

65 Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414.

66 Adams v. Woods, 9 Cal. 24.

67 Overton v. Warner, 68 Kan. 96, 74 Pac. 651.

68 Adams v. Hackett, 7 Cal. 187; Davis v. Mitchell, 34 Cal. 81. See, also, Donohoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399; Crandall v. Blen, 13 Cal. 15.

69 San Francisco Savings Union v. Reclamation Dist. No. 124, 144 Cal. 639, 79 Pac. 374.

70 Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 Pac. 1124.

71 Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492.

72 Gilman v. Contra Costa County, 8 Cal. 52, 68 Am. Dec. 290.

73 Emeric v. Gilman, 10 Cal. 404, 70 Am. Dec. 742.

possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale.[74] The interest must be a vested interest.[75]

§ 2058. **Partnership property.**—The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners.[76] But the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property, after the settlement of the partnership debts.[77] The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment.[78] But the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein.[79]

§ 2059. **Franchises.**—A ferry license, being a franchise, is not the subject of levy and sale under execution.[80] Now, by section 388 of the California Civil Code, the franchise of a corporation is subject to execution, though formerly it was not.[81] A notice

74 Crandall v. Blen, 13 Cal. 15.

75 Lemmon v. Beattie, 41 Colo. 68, 91 Pac. 1102.

76 Jones v. Thompson, 12 Cal. 191. As to levy of execution against member of firm, see Wright v. Ward, 65 Cal. 525, 4 Pac. 534.

77 Robinson v. Tevis, 38 Cal. 611.

78 Conroy v. Woods, 13 Cal. 631, 73 Am. Dec. 605.

79 Jones v. Thompson, 12 Cal. 191.

80 Thomas v. Armstrong, 7 Cal. 286.

81 See Wood v. Truckee Turnpike Co., 24 Cal. 474; Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199. As to levy of execution on a judgment, see McBride v. Fallon, 65 Cal. 301, 4 Pac. 17; Latham v. Blake, 77 Cal. 646, 18 Pac. 150, 20 Pac. 417; McLaughlin v. Alexander, 2 S. Dak. 226, 49 N. W. 99. On patent right to invention, see Pacific Bank v. Robinson, 57 Cal. 520. On broker's seat in stock and exchange board, see Habenicht v. Lissak, 78 Cal. 351, 12 Am. St. Rep. 63, 20 Pac. 874, 5 L. R. A. 713; Lowenberg v. Greenebaum, 99 Cal. 162, 37 Am. St. Rep. 42, 33 Pac. 794, 21 L. R. A. 399. On legal or equitable interest in land, see Fish v. Fowlie, 58 Cal. 373; Leroy v. Dunkerly, 54 Cal. 452; Calhoun v. Leary, 6 Wash. 17, 32 Pac. 1070. On property or funds of private corporation, see Hughes v. Oregonian Ry. Co., 11 Or. 158, 2 Pac. 94. As to exemption from execution of homesteads on public lands, see Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac.

of claim of exemption from execution signed by two persons is sufficient as a claim for either separately.[82]

§ 2060. **Mining interest.**—The interest of a miner in his mining claim is property, and may be taken and sold under execution.[83] The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure.[84]

§ 2061. **Promissory note.**—A promissory note is liable to seizure and sale under execution against the holder and payee. By such a sale, the purchaser takes the note upon the same terms upon which he would have taken it had it come into his hands in the ordinary course of business.[85]

§ 2062. **Sale under execution, how conducted.**—All sales of property under execution must be made at auction to the highest bidder, and shall be made between the hours of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy execution, no more can be sold.[86]

§ 2063. **Notice of sale.**—Before the sale of property on execution, notice thereof must be given by the sheriff.[87] Although the officer neglects to give the notice, the sale shall not be void.[88] But the officer shall in that event forfeit five hundred dollars to the aggrieved party in addition to his actual damages.[89]

A notice of sale which states the name of the plaintiff erroneously will not vitiate the sale where the statute does not require

662; Wallowa Nat. Bank v. Riley, 29 Or. 289, 54 Am. St. Rep. 794, 45 Pac. 766.

82 Stanton v. French, 83 Cal. 194, 23 Pac. 355. As to manner of sale and redemption, etc., see Cal Civ. Code, §§ 388-393.

83 McKeon v. Bisbee, 9 Cal. 137, 70 Am. Dec. 642.

84 Halsey v. Martin, 22 Cal. 645.

85 Davis v. Mitchell, 34 Cal. 81.

86 Cal. Code Civ. Proc., § 694; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Tuolumne Redemption Co. v. Sedgwick, 15 Cal. 515. As to sale in mass of real estate being void, see San Francisco v. Pixley, 21 Cal. 56.

87 As to form and sufficiency of notice, see Cal. Code Civ. Proc., § 692.

88 Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Harvey v. Fisk, 9 Cal. 93; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Burton v. Kipp, 30 Mont. 275, 76 Pac. 563.

89 Cal. Code Civ. Proc., § 693. See Askew v. Ebberts, 22 Cal. 263; Raker v. Bucher, 100 Cal. 214, 34 Pac. 654, 849. As to publication of the notice, see Northern etc. Investment Trust v. Cadman, 101 Cal. 200, 35 Pac. 557.

the notice to contain the names of the parties.[90] A sale by a sheriff under an execution after the return day of the execution is valid if he has made a levy during the lifetime of the writ, and a sale may likewise be made after the return day of a writ issued under an order of sale, where no levy is required.[91]

§ 2064. **Order of sale must issue.**—A sheriff has no authority to make sale of mortgaged premises under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands.[92] If the first order of sale on a foreclosure decree be not executed, a second order may issue,[93] or an execution may issue on personal property of defendant, where a personal judgment is also taken.[94] A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate.[95]

§ 2065. **Enjoining sale.**—Injunction will not lie to restrain a sale under an execution on a judgment already satisfied, since there is adequate remedy at law under section 1201 of the Code of Civil Procedure.[96] Failure of the purchaser to pay for four days after sale is no evidence of fraud.[97]

§ 2066. **Real property, certificate of sale.**—The officer must give to the purchaser a certificate of the sale, which must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain—1. A particular description of the real property sold; 2. The price bid for each distinct lot or parcel; 3. The whole price paid; 4. When subject to redemption, it must be so stated. And when the judgment is made payable in a specific kind of money or currency, the certificate shall

90 McLain Land etc. Co. v. Kelly, 11 Okla. 26, 66 Pac. 282.

91 Southern California Lumber Co. v. Ocean Beach Hotel Co., 94 Cal. 217, 28 Am. St. Rep. 115, 29 Pac. 627.

92 Heyman v. Babcock, 30 Cal. 367.

93 Shores v. Scott River Water Co., 17 Cal. 626.

94 Englund v. Lewis, 25 Cal. 357. That a personal judgment may be entered in connection with the decree, see Comerais v. Genella, 22 Cal. 116. As to delivery of personal property, see Cal. Code Civ. Proc., §§ 698, 699. As to assignment of judgment under sheriff's sale, see Fore v. Manlove, 18 Cal. 436. As to duty of ex-sheriff, and in case of his death, see People v. Boring, 8 Cal. 406, 68 Am. Dec. 331.

95 Lay v. Neville, 25 Cal. 551.

96 Donovan v. McDevitt, 36 Mont. 61, 92 Pac. 49.

97 Eald v. Connolly, 48 Wash. 584, 94 Pac. 188.

state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment, a duplicate of which certificate shall be filed with the recorder of the county.[98] The purchaser is substituted for and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In other cases it is subject to redemption.[99]

§ 2067. Resale of property.—If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property, at any time, to the highest bidder, and if any loss be occasioned thereby the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. Where the judgment creditor becomes the purchaser, and refuses to pay it, it is error for the court to order a satisfaction of the judgment.[100] Persons acquiescing in setting aside a sale and order of a new sale are bound thereby.[101]

§ 2068. Reversal on appeal, effect of.—A judgment unreversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back;[102] and property or advantages must be restored.[103] If there is no judgment in support of the writ of execution under which the sheriff makes the sale, the power to make the sale is wanting, and no title to the property passes,

98 Cal. Code Civ. Proc., § 700a.

99 Id. See Moore v. Martin, 38 Cal. 428; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Cloud v. El Dorado County, 12 Cal. 128, 73 Am. Dec. 526; Clark v. Lockwood, 21 Cal. 220; People v. Doe, 31 Cal. 220; Page v. Rogers, 31 Cal. 293; People v. Mayhew, 26 Cal. 655; Baber v. McLellan, 30 Cal. 135; Steinbach v. Leese, 27 Cal. 297. See, also, Bickerstaff v. Doub, 19 Cal. 109, 79 Am. Dec. 204.

100 Sweeney v. Hawthorne, 6 Nev. 129; Cal. Code Civ. Proc., § 695. As to rights of purchaser, see People v. Hays, 5 Cal. 66; Williams v. Smith, 6 Cal. 91; Harvey v. Fisk, 9 Cal. 93. For equitable relief, see Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287. Contra: see Miller v. Achurch, 50 Or. 478, 93 Pac. 332. As to the doctrine of caveat emptor, see Boggs v. Hargrave, 16 Cal. 559, 76 Am. Dec. 561; Webster v. Haworth, 8 Cal. 21. See, also, Johns v. Trick, 22 Cal. 511.

101 Miller v. Achurch, 50 Or. 478, 93 Pac. 332.

102 Raun v. Reynolds, 18 Cal. 275.

103 Reynolds v. Harris, 14 Cal. 680, 76 Am. Dec. 459; Black v. Vermont Marble Co., 137 Cal. 683, 70 Pac. 776;

even to an innocent purchaser.[104] But execution sale under a judgment entered after affirmance of judgment, rendered upon a premature and ineffectual appeal, is valid, and passes title.[105] A judgment debtor cannot waive the right of his vendee to object to a sale of his property under a void execution.[106]

Under the California statute, the measure of damages in an action to recover for property sold under an execution on a judgment subsequently reversed is limited to the proceeds of the execution sale less the expenses thereof.[107]

§ 2069. **Sale in parcels.**—The well-established rules of equity proceedings require, in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second.[108] Tracts levied on separately must not be sold in mass, and, if so sold, the creditor may move to set aside the sale, even though a stranger becomes the purchaser.[109] Such a sale is not void, but voidable.[110]

§ 2070. **Setting aside sale.**—Any person interested in defeating the sale, though not a party, may move to set the sale aside.[111] The purchaser at a sheriff's sale is entitled to notice of motion to set it aside, and personal service is not excused, even if he is absent from the state.[112] Where the property sold does not belong to the judgment debtor the case comes within the provision of section 708 of the California Code of Civil Procedure, and the judgment

Di Nola v. Allison, 143 Cal. 106, 101 Am. St. Rep. 84, 76 Pac. 976, 65 L. R. A. 419.

104 Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193. See Reynolds v. Lincoln, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

105 Brady v. Burke, 90 Cal. 1, 27 Pac. 52.

106 Dorland v. Smith, 93 Cal. 120, 28 Pac. 812.

107 Dowdell v. Carpy, 137 Cal. 333, 70 Pac. 167.

108 Raun v. Reynolds, 11 Cal. 14.

109 Browne v. Ferrea, 51 Cal. 552. As to sales in mass, see Marston v. White, 91 Cal. 37, 27 Pac. 588; Gleason v. Hill, 65 Cal. 17, 2 Pac. 413; Riddle v. Harrell, 71 Cal. 254, 12 Pac. 67; Vigoureux v. Murphy, 54 Cal. 346. As to parol waiver of sale of land in parcels, see Hudepohl v. Liberty Hill etc. Min. Co., 94 Cal. 588, 28 Am. St. Rep. 149, 29 Pac. 1025.

110 Bechtel v. Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549.

111 Sparks v. City Nat. Bank, 21 Okla. 827, 97 Pac. 575.

112 Eckstein v. Calderwood, 34 Cal. 658. See Power v. Larabee, 3 N. Dak. 502, 57 N. W. 789, 44 Am. St. Rep. 577. As to rights of purchaser, on motion to set aside sale for irregularity, see Cal. Code Civ. Proc., § 708.

may be revived.[113] A debtor ignorant of the levy and sale, through no fault of his own, may have a sale of valuable property set aside because valuable property was sold for a nominal sum, though the statutory notice of the sale was given.[114] But a sale cannot be set aside on motion of the defendant two years after confirmation where no reason is shown for such delay, and only such matters are presented as were necessarily involved in the order of confirmation.[115] An objection which should have been made at the time when confirmation was had cannot be made the basis of a motion to set aside the sale.[116] Mere irregularities in the method of appraisement are not grounds for setting a sale aside.[117] A sale may be set aside where the sheriff sold more property than was necessary,[118] or where the price was so inadequate as to be unconscionable.[119] Where the right of redemption is interfered with by selling several parcels in a lump, then it is the duty of the court to set aside the sale, unless the purchaser can show that no possible injury with respect to his redemption right could have resulted to the defendant by the disregard of the statute requiring sale in separate parcels.[120]

§ 2071. Sheriff's deed.—If no redemption be made within twelve months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he is restored to his estate.[121] A deed executed by the sheriff immediately after

113 Cross v. Zane, 47 Cal. 602. As to the revival of judgments and proceedings therefor, see Humiston v. Smith, 21 Cal. 129; Hitchcock v. Caruthers, 100 Cal. 100, 34 Pac. 627. Consult, also, Boggs v. Hargrave, 16 Cal. 566, 76 Am. Dec. 561; Burton v. Lies, 21 Cal. 88.

114 Odell v. Cox, 151 Cal. 70, 90 Pac. 194.

115 Hill v. Gatliff, 69 Kan. 179, 76 Pac. 428.

116 Otis v. Nash, 26 Wash. 39, 66 Pac. 111.

117 Trowbridge v. Cunningham, 63 Kan. 847, 66 Pac. 1015.

118 McCoy v. Brooks, 9 Ariz. 157, 80 Pac. 365.

119 Id.; Bank v. Doherty, 37 Wash. 32, 79 Pac. 486.

120 Power v. Larabee, 3 N. Dak. 502, 44 Am. St. Rep. 577, 57 N. W. 789. See, also, Smith v. Huntoon, 134 Ill. 24, 24 N. E. 971, 23 Am. St. Rep. 652; Graffan v. Burgess, 117 U. S. 180, 29 L. Ed. 839, 6 Sup. Ct. 686. Compare Orton v. Brown, 113 Cal. 561, 45 Pac. 835.

121 Cal. Code Civ. Proc., § 703.

the sale, without waiting the statutory time, is void.[122] The sheriff's deed need not recite the judgment and execution under which he acted; it is sufficient if it recites enough to show the authority of the sheriff to sell.[123] A sheriff's deed, executed in pursuance of an execution sale under a judgment in an attachment suit, takes effect from the date of the attachment if the levy was such as to create a lien.[124] A recital in a sheriff's deed given to the execution purchaser, "that there had been no redemption from the sale," is not conclusive upon a grantee of the judgment debtor who had made a valid redemption. The grantee may attack such deed in an action of ejectment, without resorting to equity to have it set aside.[125]

§ 2072. Title acquired by sale.—The statute of California, in providing that until a levy property shall not be affected by the execution,[126] has gone further than the English statute, and has entirely obviated the evils of the common-law rule.[127] So in the case of personal property, the title transferred by the sale cannot antedate the day of sale, as against *bona fide* purchasers, where the seizure was made only on the day of sale;[128] so in case of land, the title dates from the docketing of judgment as against third persons, and not from the date of any real or pretended statutory levy.[129] The legal title remains in the debtor until execution and delivery of the sheriff's deed.[130] During the period of redemption, the dry, naked legal title remains in the judgment debtor, with a legal authority vested in the sheriff to divest it, at the expiration of the redemption period, by executing a deed to

122 Gross v. Fowler, 21 Cal. 392; Bernal v. Gleim, 33 Cal. 668; Perham v. Kuper, 61 Cal. 331.

123 Clark v. Sawyer, 48 Cal. 133; Montgomery v. Robinson, 49 Cal. 258. As to effect of sheriff's deeds and certificates of sale, see the following cases: Anthony v. Wessel, 9 Cal. 103; Knight v. Fair, 9 Cal. 117; Tuolumne Redemp. Co. v. Sedgwick, 15 Cal. 515; McCarty v. Christie, 13 Cal. 81; Lewes v. Thompson, 3 Cal. 266; Mills v. Tukey, 22 Cal. 373, 83 Am. Dec. 74; Donahue v. McNulty, 24 Cal. 411, 85 Am. Dec. 78; People v. Doe, 31 Cal. 220; Hutchings v. Ebeler, 46 Cal. 557; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1099; Miller v. Luco, 80 Cal. 257, 22 Pac. 195; Christy v. Springs, 11 Okla. 710, 69 Pac. 864.

124 Riley v. Nance, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315.

125 Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

126 Cal. Code Civ. Proc., § 688.

127 Blood v. Light, 38 Cal. 657, 99 Am. Dec. 441.

128 Allentown Bank v. Beck, 49 Pa. St. 409.

129 Blood v. Light, 38 Cal. 657, 99 Am. Dec. 441.

130 Paxton v. Heron, 41 Colo. 147, 92 Pac. 15.

the purchaser.[131] A mortgagor, after the sale, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor, such as the engine and boilers, etc., used in a flour-mill.[132]

§ 2073. Title, character of.—A purchaser at an execution sale acquires only such title as the judgment debtor has.[133] The purchaser of a judgment on sale under execution and levy takes as assignee only, assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner.[134]

A creditor who acquires title to his debtor's property by attachment and sale on execution is not a *bona fide* purchaser for value.[135] He takes subject to any unrecorded equity known to him.[136]

§ 2074. Title, on what it depends.—The purchaser's title in no respect depends upon the return, but upon the judgment, sale, and deed.[137] The title of a purchaser, under a sale on a decree of foreclosure, cannot be impeached in a collateral action for irregularity in the proceedings on the sale.[138]

§ 2075. Redemption after sale—Payments, how made.—The payment in case of redemption may be made to the purchaser

131 Wood v. Conrad, 2 S. Dak. 405, 50 N. W. 903.

132 Sands v. Pfeiffer, 10 Cal. 258.

133 Costello v. Friedman, 8 Ariz. 215, 71 Pac. 935; Mosier v. Monsen, 13 Okla. 41, 74 Pac. 905.

134 Fore v. Manlove, 18 Cal. 436.

135 Lee v. Wrixon, 37 Wash. 47, 79 Pac. 489.

136 Robinson v. Muir, 151 Cal. 118, 90 Pac. 521.

137 Cloud v. El Dorado Co., 12 Cal. 128, 73 Am. Dec. 526; Clarke v. Lockwood, 21 Cal. 220; Moore v. Martin, 38 Cal. 428. Consult, as to title acquired by purchaser, Breeze v. Brooks, 71 Cal. 169, 9 Pac. 670, 11 Pac. 885; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; Blakeman v. Puget Sound Iron Co., 72 Cal. 321, 13 Pac. 872; Hibberd v. Smith, 67 Cal. 547, 56 Am. Rep. 726, 4 Pac. 473, 8 Pac. 46; Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647; Bullard v. McArdle, 98 Cal. 355, 35 Am. St. Rep. 176, 33 Pac. 193; Los Angeles Co. Bank v. Raynor, 61 Cal. 145; Wilson v. Madison, 55 Cal. 5.

138 Nagle v. Macy, 9 Cal. 426. Consult Hayes v. Shattuck, 21 Cal. 51; Boggs v. Hargrave, 16 Cal. 566, 76 Am. Dec. 561; Burton v. Lies, 21 Cal. 88.

or redemptioner, or for him to the officer who made the sale. When the judgment has been made payable in a specified kind of money or currency, payment must be in the same; and a tender of the money is equivalent to payment.[139] Payment cannot be made in certified checks.[140] Where a particular currency is not specified, legal-tender notes are sufficient.[141]

Redemption by a judgment creditor does not vacate the sale, but merely transfers to such creditor the rights of the creditor from whom he redeems.[142]

§ 2076. Proceedings on redemption.—The redemptioner must produce a copy of the docket of judgment, certified by the clerk, or a note of the record of a mortgage or lien certified by the recorder;[143] and if an assignee, a copy of the assignment necessary to establish his claim,[144] and an affidavit by himself or his agent showing the amount then actually due on the lien.[145] But these requirements do not apply to the judgment debtor; he may redeem without the production of such credentials,[146] and during the time for redemption the court may restrain waste.[147]

Where the redemptioner is entitled to and demands a sworn statement of rents and profits received, the giving of a statement, not sworn, amounts to a failure to give any statement.[148]

§ 2077. Sale of equity of redemption.—The sale of the equity of redemption of mortgaged premises, and assignment of the

139 Cal. Code Civ. Proc., § 704.

140 People v. Hays, 4 Cal. 127.

141 People v. Mayhew, 26 Cal. 655. As to who may receive redemption money, see People v. Boring, 8 Cal. 406, 68 Am. Dec. 331; Baber v. McLellan, 30 Cal. 135; People v. Mayhew, 26 Cal. 655.

142 Roose v. Gove, 32 Colo. 522, 77 Pac. 246.

143 Cal. Code Civ. Proc., § 705, subd. 1; Haskell v. Manlove, 14 Cal. 54.

144 Cal. Code Civ. Proc., § 705, subd. 2; Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

145 Cal. Code Civ. Proc., § 705, subd. 3.

146 Yoakum v. Bower, 51 Cal. 539.

147 Cal. Code Civ. Proc., § 706. As to the rents and profits intermediate the sale and final redemption, see Cal. Code Civ. Proc., § 707; Guy v. Middleton, 5 Cal. 392; Reynolds v. Lathrop, 7 Cal. 43; McDevitt v. Sullivan, 8 Cal. 592; Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Kelsey v. Abbott, 13 Cal. 609; Knight v. Truett, 18 Cal. 113; Kline v. Chase, 17 Cal. 596; Whitney v. Allen, 21 Cal. 233; Shores v. Scott River Co., 21 Cal. 135; Henry v. Everts, 30 Cal. 425; Mayo v. Woods, 31 Cal. 269; Page v. Rogers, 31 Cal. 293. See, also, Frink v. Le Roy, 49 Cal. 315; Walker v. McCusker, 71 Cal. 594, 12 Pac. 723; Clement v. Shipley, 2 N. Dak. 430, 51 N. W. 414.

148 Kennedy v. Trumble, 32 Wash. 614, 73 Pac. 698.

rents thereof, until foreclosure and sale, to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by a foreclosure.[149]

§ 2078. Redemption, how effected.—The judgment debtor or redemptioner may redeem the property from the purchaser at any time within twelve months after the sale, on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount; and if the purchaser be also a creditor having a prior lien to that of the redemptioner other than the judgment under which such purchase was made, the amount of such lien, with interest.[150]

§ 2079. Subsequent redemption.—If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest. The property may be successively redeemed as often as a redemptioner is so disposed on the above terms. Notice of redemption shall be given to the sheriff.[151] If a redemptioner redeem, and no redemption be made from him within sixty days, his right to the sheriff's deed is absolute.[152]

149 Dewey v. Latson, 6 Cal. 609. As to relative rights of parties thereunder, consult Montgomery v. Tutt, 11 Cal. 307; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; McDermott v. Burke, 16 Cal. 580; Harlan v. Smith, 6 Cal. 173; Cowing v. Rogers, 34 Cal. 648; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540; Alexander v. Greenwood, 24 Cal. 506; Bludworth v. Lake, 33 Cal. 255, 265.

150 Cal. Code Civ. Proc., § 702, as amended 1897. Months as used in the statute, how defined, see Gross v. Fowler, 21 Cal. 392. As to taxes, see People v. Doane, 17 Cal. 476. As to interest, see McMillan v. Vischer, 14 Cal. 232; Kirkham v. Dupont, 14 Cal. 559. Estate, in whom vested, see McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655; Anthony v. Wessels, 9 Cal. 103. As to excessive payment not compulsory, see McMillan v. Vischer, 14 Cal. 235. As to payment of amount of prior judgment, see Campbell v. Oaks, 68 Cal. 222, 9 Pac. 77.

151 Cal. Code Civ. Proc., § 703, as amended 1895.

152 Boyle v. Dalton, 44 Cal. 332.

§ 2080. Who may redeem.—Property sold subject to redemption, or any part sold separately, may be redeemed in the manner provided, by the following persons, or their successors in interest: 1. The judgment debtor, or his successor in interest, in the whole or any other part of the property; 2. A creditor, having lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.[153] Under the Oregon statute, the right to redeem is not merely a privilege personal to the debtor, but is a right of property, and subject to bargain and sale.[154] The issuance by the sheriff of a certificate of redemption is not necessary to render effectual a redemption of real estate sold under execution.[155] The judgment debtor may redeem from an execution sale, notwithstanding he has conveyed his interest to another in the property sold.[156]

§ 2081. Effect of redemption.—One subsequently purchasing the judgment debtor's interest and redeeming from execution sale acquires title free from the lien of the deficiency judgment.[157]

§ 2082. Proceedings on trial of right to property.—If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.[158] An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.[159] In a suit against the sheriff for not levying the

153 Cal. Code Civ. Proc., § 701. See Phillips v. Hagart, 113 Cal. 553, 54 Am. St. Rep. 369, 45 Pac. 843.

154 Rosenberg v. Croisan, 18 Or. 470, 23 Pac. 847.

155 Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

156 Yoakum v. Bower, 51 Cal. 540. Statute, how defined, see Guy v. Middleton, 5 Cal. 392; Seale v. Mitchell, 5 Cal. 401; Tuolumne Redemp. Co. v. Sedgwick, 15 Cal. 515; McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655. As to rights of redemption, see Raun v. Reynolds, 11 Cal. 20; Montgomery v. Tutt, 11 Cal. 317; Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Grattan v. Wiggins, 23 Cal. 16; People v. Mayhew, 26 Cal. 655; Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748; Gamble v. Voll, 15 Cal. 510; Daubenspeck v. Platt, 22 Cal. 330. See, also, Cal Code Civ. Proc., §§ 702, 703, as amended 1897.

157 McQueeney v. Toomey, 36 Mont. 282, 122 Am. St. Rep. 358, 92 Pac. 561.

158 Davidson v. Dallas, 8 Cal. 227.

159 Stark v. Raney, 18 Cal. 622.

execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the sheriff required by law.[160] The sheriff must prove a valid judgment before he can attack a transfer of property in fraud of creditors.[161]

§ 2083. **Verdict, effect of.**—A sheriff is not protected in the sale of personal property by the verdict of a jury on the trial of the right of property summoned, as formerly allowed by the Practice Act.[162] The proceedings before a sheriff in such a trial were not judicial.[163] A sheriff who sells personal property under execution, which is immediately taken possession of by the purchaser, is only liable, upon such sale being set aside, for his failure to retake the property.[163a]

§ 2084. **Writ of assistance—When issued.**—A writ of assistance can only issue against the defendants in the suit and parties holding under them who are bound by the decree.[164] *Prima facie,* all who come into possession of the land pending the action to recover possession must go out under the writ of possession, if the plaintiff recovers; for the presumption is that they came in under the defendant.[165] If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained.[166] If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.[167]

160 Strong v. Patterson, 6 Cal. 156. See Cal. Code Civ. Proc., § 689.

161 Cockrell v. Schmitt, 20 Okla. 207, 94 Pac. 521.

162 Cal. Code Civ. Proc., § 689.

163 Perkins v. Thornburgh, 10 Cal. 189; Sheldon v. Loomis, 28 Cal. 122.

163a Orton v. Brown, 113 Cal. 561, 45 Pac. 835.

164 Burton v. Lies, 21 Cal. 87. Consult, on this subject, Harlan v. Rackerby, 24 Cal. 561; Sampson v. Ohleyer, 22 Cal. 200; Skinner v. Beatty, 16 Cal. 156; South Beach Land Assoc. v. Christy, 41 Cal. 501.

165 Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Leese v. Clark, 29 Cal. 664.

166 Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166.

167 Steinbach v. Leese, 27 Cal. 297.

§ 2085. **Object of writ.**—A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.[168] On a motion for a writ of assistance, questions of equitable cognizance between the parties in possession of the land who were not parties to the foreclosure suit and the plaintiff, as to their respective rights, cannot be litigated.[169] In executing the writ, it is the duty of the sheriff to place the purchaser of an estate in common in possession of every part of the land jointly with the other tenants in common. But he cannot remove any tenant in common who holds title from an independent source.[170]

§ 2086. **Power of judge to grant.**—Prior to the passage of the California act of May 18, 1861, judges of courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same.[171]

§ 2087. **Proceedings requisite.**—All that is requisite to obtain a writ of assistance, as against the parties and those claiming with notice under them, after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them and a demand of the possession, and their refusal to surrender it.[172] Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled as a matter of course to the writ, as against the defendant in the suit.[173]

§ 2088. **Setting aside writ.**—If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service and restore the pos-

168 Montgomery v. Tutt, 11 Cal. 190; Reynolds v. Harris, 14 Cal. 677.

169 Henderson v. McTucker, 45 Cal. 647.

170 Tevis v. Hicks, 38 Cal. 234.

171 Chapman v. Thornburg, 23 Cal. 48. See, also, People v. Doe, 31 Cal. 220.

172 Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

173 Montgomery v. Tutt, 11 Cal. 190; Reynolds v. Harris, 14 Cal. 677, 76 Am. Dec. 459.

session.[174] When a writ is granted and issued, one who was not a party to the action at the time of such issuance may move to set the order aside and appeal from an order denying the motion.[175]

§ 2089. **Who entitled.**—*Prima facie*, plaintiff in a foreclosure suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance, as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession.[176] So the purchaser under a decree of foreclosure is entitled to a writ of assistance.[177] The writ should not issue in favor of a purchaser from the sheriff's grantee on a tax sale; it can only issue in favor of the grantee of the sheriff. Where the sheriff's grantee holds as trustee for another party the writ should not issue in case of controversy.[178]

§ 2090. **Wrongful levy of execution.**—In Colorado, a judgment creditor may be held for treble damages for wrongful levy by the officer upon exempt property.[179]

§ 2091. **Recalling, quashing, or setting aside execution.**—The superior court has power to recall an execution which has been improperly issued after the expiration of the time allowed by law for its issuance, and to order the sheriff to refund the money collected by him thereon.[180] And an order may be properly made by one department of the superior court vacating an execution wrongfully allowed by another department of the same court.[181] In Kansas, injunction lies to enjoin an execution on a dormant judgment,[182] but it must appear there is no adequate remedy at law.[183] A motion to recall an execution is a new and original proceeding, in which the moving party may employ such attorneys

174 Skinner v. Beatty, 16 Cal. 156; City of San Jose v. Fulton, 45 Cal. 316.

175 Mills v. Smiley, 9 Idaho, 317, 76 Pac. 783.

176 Skinner v. Beatty, 16 Cal. 156.

177 Montgomery v. Middlemiss, 21 Cal. 103, 81 Am. Dec. 146.

178 People v. Grant, 45 Cal. 97; City of San Jose v. Fulton, 45 Cal. 316.

179 Seerie v. Brewer, 40 Colo. 299, 122 Am. St. Rep. 1065, 90 Pac. 508; Colo. Mills Annot. Stats., § 2564.

180 McMann v. Superior Court, 74 Cal. 106, 15 Pac. 448; Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

181 Dorland v. Hanson, 81 Cal. 202, 15 Am. St. Rep. 44, 22 Pac. 552.

182 Updegraff v. Lucas, 76 Kan. 456, 93 Pac. 630, 94 Pac. 121.

183 Eisenhauer v. Quinn, 36 Mont. 368, 122 Am. St. Rep. 370, 93 Pac. 38, 14 L. R. A. (N. S.) 435.

as he may choose to conduct it;[184] and the fact that the notice of the motion is signed by attorneys other than those who appeared for the judgment debtor in the original action, and that no substitution is shown, does not render the notice illegal.[185] But the party interested must proceed in the court in which the execution issued; he cannot proceed by injunction in a separate action.[186] Where an execution is issued without authority, a motion to recall it, "for the reason that the said execution was wrongfully, unlawfully, and improperly issued," sufficiently states the grounds of the motion.[187] An order granting an execution upon a judgment awarded in the superior court as a court of probate, after the lapse of five years from the entry of judgment, is in excess of the jurisdiction of the court, and will be annulled by the supreme court upon a writ of review.[188] If an execution is radically defective in failing to follow the judgment, the writ may be quashed by the court in the exercise of a superintending power over its process.[189]

§ 2092. Execution—When writ of is functus officio.—When there has been no levy under the execution, and the return day has expired, the writ is *functus officio,* and confers no authority whatever, and a levy and sale by virtue of it is a nullity.[190]

§ 2093. Enforcement of decree in equity.—Under the California procedure, there is but one form of civil action for the enforcement of a private right, and the rules which, under the chancery practice, prevent the enforcement of a decree in equity by a proceeding at law have no application. And an action may be maintained by a judgment creditor to enforce a judgment for the foreclosure of the mortgage, declaring the indebtedness therein ascertained to be a lien upon the mortgaged land, and directing a sale of the land to satisfy the indebtedness, although he may also have a remedy for the enforcement of the judgment by a

184 McDonald v. McConkey, 54 Cal. 143.

185 Buell v. Buell, 92 Cal. 393, 28 Pac. 443.

186 Crist v. Cosby, 11 Okla. 635, 69 Pac. 885; Ward v. Rees, 11 Wyo. 459, 72 Pac. 581.

187 Buell v. Buell, 92 Cal. 393, 28 Pac. 443. Execution erroneously recalled, as to remedy, see Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545.

188 Cortez v. Superior Court, 86 Cal. 274, 21 Am. St. Rep. 37, 24 Pac. 1011.

189 Flint v. Phipps, 20 Or. 340, 23 Am. St. Rep. 124, 25 Pac. 725.

190 Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; Kane v. Preston, 24 Miss. 183.

sale within five years from its entry.[191] A court of equity will always find a means of enforcing its decree against a delinquent defendant, and its power in this respect is as extensive as the exigencies of the case.[192]

FORMS OF EXECUTION.

§ 2094. Execution—General form.

Form No. 530.

[TITLE.]

The People of the State of . . . to the Sheriff of the County of . . . , greeting:

Whereas, on the . . . day of . . ., 19.., A. B., plaintiff, recovered a judgment in the said superior court of the state of . . ., in and for the . . . county of . . ., against C. D. for the sum of . . . dollars damages, with interest at the rate of . . . per cent per . . ., till paid, together with costs and disbursements at the date of said judgment, and accruing costs, amounting to the sum of . . . dollars, lawful money of the United States, as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the . . . county of . . ., and the said judgment was docketed in said clerk's office in the said . . . county, on the day and year first above written.

And the sum of . . . dollars, with interest thereon, is now (at the date of this writ) actually due on said judgment.

Now you, the said sheriff, are hereby required to make the said sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of said debtor; or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him, on the day whereon said judgment was docketed in the said city and county, or at any time thereafter, and make return of this writ within sixty days after your receipt thereof, with what you have done indorsed hereon.

191 Rowe v. Blake, 99 Cal. 167, 37 Am. St. Rep. 45, 33 Pac. 864.

192 Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788.

Witness, the Hon. J. K., judge of the said superior court, at the courthouse in the county of . . . this . . . day of . . ., 19..

Attest my hand and the seal of said court, the day and year last above written.

K. L., Clerk.

[SEAL OF COURT.] By O. P., Deputy Clerk.

§ 2095. Execution against the person.

Form No. 531.

[TITLE.]

The People of the State of . . . to the Sheriff of the County of . . ., greeting:

Whereas, judgment was surrendered on the . . . day of . . ., 19.., in an action in the . . . court for . . . county, between A. B., plaintiff, and C. D., defendant, in favor of said plaintiff, and against said defendant, for [state the relief granted in the judgment], as appears by the judgment-roll filed in the office of the clerk of said court, in said county of . . .;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19.., and the sum of . . . dollars is now actually due and unpaid thereon, besides interest;

And whereas, an execution against the property of the said C. D. has been duly issued to you [or, to the sheriff of . . . county] and returned unsatisfied:

Therefore, we command you, that you arrest the said C. D., and commit him to the common jail of your county until he shall pay the said judgment or be thence discharged according to law; and make due return of this writ.

Witness, the Hon. J. K., judge of said court, at . . ., in said county, the . . . day of . . ., 19..

[SEAL OF COURT.]

Attest: L. M., Clerk. [SIGNATURE.]

§ 2096. Execution for the delivery of specific personal or real property.

[TITLE.] Form No. 532.

The People of the State of . . . to the Sheriff of the County of . . ., greeting:

Whereas, judgment was rendered on the . . . day of . . ., 19.., in an action in the . . . court for . . . county, between A. B.,

plaintiff, and C. D., defendant, in favor of A. B., plaintiff, and against C. D., defendant, for the delivery to the said plaintiff of the possession of the following described personal property, to wit: [describe same]; or if a delivery thereof cannot be had, then for . . . dollars, the value thereof duly assessed, and also for the sum of . . . dollars damages and costs [or, the following described real property: [describing same], and also for the sum of . . . dollars costs, damages, rents, and profits], as appears by the judgment-roll filed in the office of the clerk of said court of said county of . . . ;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19.., and the sum of . . . dollars is now actually due and unpaid thereon, with interest [and . . . dollars additional, with interest as aforesaid, in case a delivery cannot be had]:

Therefore, we command you, that you deliver the said property to the said A. B., and that you satisfy the said sum of . . . dollars, with interest as aforesaid [in case of personal property, add: and also in case a delivery of said personal property cannot be had, the further sum of . . . dollars with interest as aforesaid] out of the personal property of the said judgment debtor in your county; or if sufficient personal property cannot be had, then out of the real property in your county belonging to said judgment debtor on the day when such judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be, and return this execution, etc.

§ 2097. Special execution in foreclosure.

Form No. 533.

[TITLE.]

The People of the State of . . . to the Sheriff of the County of . . . , greeting:

Whereas, A. B., on the . . . day of . . ., 19.., filed his petition in the . . . court of . . . county, against C. D., praying for the foreclosure of a certain mortgage upon the premises hereinafter described, and such proceedings were thereafter had in said action that judgment was rendered by said court in said action on the . . . day of . . ., 19.., in favor of said A. B., and against said C. D., for the sum of . . . dollars damages, and . . . dollars costs, including attorney's fees, with interest on said damages at the rate of . . . per cent per annum from the date of said judgment, and

forever barring and foreclosing the equity of redemption of said defendant in and to said mortgaged premises, and ordering that the same, or so much thereof as shall be necessary, be sold to satisfy said judgment, with the interest and costs aforesaid, and ordering a special execution to issue:

Therefore, you are commanded, that of the following described real estate in . . . county, . . ., viz. [here describe real estate], or so much thereof as may be necessary by levy and sale, pursuant to the statute in such case made and provided, you cause to be made the sum of . . . dollars debt, and the sum of . . . dollars costs, including attorney's fees, with interest as aforesaid, and all accruing costs; and of this writ make due return to the court within . . . days hereof.

Witness, L. M., clerk of said court, and the seal of said court affixed at my office in . . . in said county, this . . . day of . . ., 19..

[SEAL.] L. M., Clerk, etc.

§ 2098. Special execution on mechanic's lien judgment.

Form No. 534.

[TITLE.]

The State of . . ., to the Sheriff of . . . County, greeting:

Whereas, on the . . . day of . . ., 19.., the plaintiff, A. B., recovered a judgment in the above-entitled action, whereby it was adjudged that there was then due to the plaintiff from the defendant, C. D., on the contract and claim for a mechanic's lien mentioned and described in the complaint, the sum of . . . dollars, besides the sum of . . . dollars costs and disbursements at the date of said judgment, and whereby it was further established and adjudged that the plaintiff possessed a mechanic's lien for the amount so adjudged to be due the plaintiff, with costs and disbursements as aforesaid, upon the following-described premises, to-wit: [insert description], and that said premises be sold to satisfy said lien and costs:

Therefore, we command you, that you execute said judgment by making sale of said premises herein above described, or so much thereof as may be necessary to satisfy said sums so adjudged to be due to the plaintiff, with interest thereon from the date of said judgment, together with costs and expenses of sale, in accordance with the requirements of said judgment, and apply the funds

realized on said sale in conformity therewith; and make the return of this writ to the clerk of said court.

Witness, etc.

§ 2099. Execution to enforce lien on specific property.

Form No. 535.

[TITLE.]

The State of . . ., to the Sheriff of the County of . . ., greeting:

Whereas, judgment was rendered on the . . . day of . . ., 19. . , in an action in the . . . court for . . . county, between A. B., plaintiff, and C. D., defendant, in favor of said plaintiff, and against said defendant, for the sum of . . . dollars, damages and costs, as appears by the judgment-roll filed in the office of the clerk of said court, in said county of . . . ;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19. . , and the sum of . . . dollars is now actually due and unpaid thereon, besides interest;

And whereas, the said judgment was adjudged to be a lien upon the interest of the said C. D. in and to the following-described real estate: [describe same; or, upon the following-described personal property, describing same], which said C. D. had on the . . . day of . . ., 19. . :

Now, therefore, we command you, that you satisfy the said judgment, with interest and costs of sale, by selling all the interest which the said C. D. had in and to said premises and the real estate [or, in and to said personal property above described], at the time such lien attached thereto, to-wit, the . . . day of . . ., 19. . , in whosoever hands the same may be; and that if said property so sold be insufficient to satisfy said judgment, that you satisfy the said deficiency out of the personal property of said C. D. within your county; and if sufficient personal property cannot be found, then out of the real property in your county belonging to said C. D. on the day when said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same may be; and return this execution, etc.

§ 2100. Execution to enforce judgment lien on logs and timber.

Form No. 536.

[TITLE.]

[Proceed as in last form to the command, and continue:]

Now, therefore, we command you, that you sell said logs and

timber above described, or so much thereof as may be necessary to satisfy said judgment and attorney's fees and costs of sale; and that if said property so subject to lien be insufficient, then that you satisfy the said deficiency out of the personal property of said C. D., etc. [continuing as in last preceding form].

§ 2101. Execution on judgment for joint debt when some defendants were not served.

Form No. 537.

[TITLE.]

The State of . . ., to the Sheriff of the County of . . ., greeting:

Whereas, judgment was rendered on the . . . day of . . ., 19 . ., in an action in the . . . court for . . . county, between A. B., plaintiff, and C. D., defendant, in favor of said plaintiff, and against said defendant, for the sum of . . . dollars, damages and costs, as appears by the judgment-roll filed in the office of the clerk of said court in said county of . . . ;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19. ., and the sum of . . . dollars is now actually due and unpaid thereon, besides interest:

Therefore, we command you, that you satisfy the said judgment, with interest, out of the joint personal property of the defendant, C. D., [defendant served] within your county; or if sufficient personal property cannot be found, then out of the real property in your county belonging jointly to all the defendants, or separately to the defendant C. D., on the day when the said judgment was so docketed in your county, or at any time thereafter, in whose hands soever the same be; and return this execution within sixty days after its receipt by you, to the clerk of the . . . court of said county of . . . .

Witness, the Hon. J. K., judge of said court, at . . ., in said county, the . . . day of . . ., 19. .

[SEAL.]

§ 2102. Undertaking of indemnity to sheriff.

Form No. 538.

[TITLE.]

Know all men by these presents, that we, J. R., as principal, and L. M. and N. O., as sureties, are held and firmly bound unto R. S., sheriff of the . . . county of . . ., in the sum of . . . dollars, [double the value of the property levied upon] gold coin of

the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the . . . day of . . ., 19..

Whereas, under and by virtue of a writ of execution, issued out of the . . . court of the . . . county of . . ., in an action wherein the said J. R. was plaintiff and C. D. was defendant, against said defendant, directed and delivered to said R. S., sheriff of the . . ., county of . . ., the said sheriff was commanded to satisfy the judgment in said action, with interest, out of the personal property of such defendant within his county not exempt from execution; and if sufficient personal property could not be found, then out of the real property belonging to . . . on the day when the said judgment was docketed, or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following-described goods and chattels:

[DESCRIPTION.]

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, P. Q. by written claim, duly verified by his [or his agent's] oath, setting out his title thereto, did claim the said goods and chattels as his property, [or his right to the possession of said goods and chattels] and served the same upon said R. S., sheriff;

And whereas, the said plaintiff, notwithstanding such claim requires of said sheriff that he shall retain said property under such levy and in his custody:

Now, therefore, the condition of this obligation is such, that if the said L. M. and N. O., their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, administrators, and assigns, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain, or in any wise be put to, for or by reason of the levy, taking, sale, or retention by the said sheriff in his custody under said execution, of the said property claimed as aforesaid, then the above obligation to be void; otherwise, to remain in full force and virtue. [SIGNATURES AND SEALS.]

[AFFIDAVIT OF QUALIFICATION.]

§ 2102a. Undertaking of party claiming property.

Form No. 538a.

[TITLE.]

Whereas, . . ., sheriff of the county of . . ., state of California, under and by virtue of a writ of execution, issued out of the . . . court of the . . . county of said state, in an action wherein . . . is plaintiff and . . . is defendant, against the said . . ., defendant, was commanded to satisfy the judgment in said action, out of the personal property of said defendant within his county and not exempt from execution; and if sufficient personal property could not be found, then out of the real property belonging to said defendant on the day when the said judgment was entered, or at any time subsequently; and the said sheriff did thereupon levy upon and take into his possession the following described goods and chattels:

[DESCRIPTION.]

And whereas, said above-described goods and chattels [or describe the portion claimed] are the property of the undersigned . . ., [person, corporation, partnership, or association], claimant, who claims said above-described goods and chattels, [or the portion of said goods and chattels last above described] as his own;

And whereas, the estimated value of said property claimed by said claimant is . . . dollars; and whereas said execution is levied thereon for the amount of . . . dollars:

Now, therefore, we, the undersigned, . . ., the claimant aforesaid, the principal herein, and . . . and . . ., sureties, do hereby jointly and severally undertake and bind ourselves, our heirs, executors, and administrators, that if the said above-described property, claimed by said . . ., claimant and principal herein, is finally adjudged to be the property of the judgment debtor hereinabove, and in said execution and judgment named, that said . . ., claimant and principal herein will well and truly pay of said judgment upon which said execution issued, . . . dollars [naming the estimated value of the property claimed].

In witness whereof, we have hereunto set our hands and seals this the . . . day of . . ., 19..

[SIGNATURES.]

[Add justification clause.]

§ 2103. Writ of possession.

Form No. 539.

[TITLE.]

The People of the State of . . . , to the Sheriff of the County of . . . , greeting:

Whereas, on the . . . day of . . . , 19.. , A. B., plaintiff, recovered a judgment in the said superior court of the state of . . . in and for the said county of . . . , against C. D., defendant, for the possession of certain premises in said judgment and decree and hereinafter more particularly described, and also for the sum of . . . dollars, damages for the detention of said premises, besides the sum of . . . dollars, costs and disbursements, as appears to us of record;

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the said county of . . . , and the said judgment was docketed in said clerk's office, in the said . . . county, on the day and year first above written:

Now, therefore, you, the said sheriff, are hereby commanded and required to place the said A. B. in the quiet and peaceable possession of the lands and premises in said judgment and decree described, as follows, to-wit:

[DESCRIPTION.]

And whereas, the sums of . . . dollars, damages, and . . . dollars, costs, are now (at the date of this writ) actually due on said judgment:

You, the said sheriff, are hereby further required to make the said sums due on the said judgment, for damages and costs; and all accruing costs, to satisfy the said judgment, out of the . . . personal property of said debtor, C. D., or if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said . . . county or at any time thereafter; and make return of this writ within . . . days after your receipt hereof, with what you have done indorsed hereon.

Witness, Hon. J. K., judge of the said superior court, at the courthouse in the said county of . . . and the seal of said court, this . . . day of . . . , 19..

[SEAL.] [SIGNATURE OF CLERK.]

§ 2104. Petition for writ of assistance after execution sale.

Form No. 540.

[TITLE.]

To the . . . Court of the County of . . ., State of . . ., [or, to Hon. R. S., Judge of the . . . Court].

The petition of A. B., of . . ., respectfully shows:

That on the . . . day of . . ., 19. . , in the court for said county, in an action then pending, wherein A. B. was plaintiff, and C. D. was defendant, it was adjudged [state fully the terms of the judgment];

That execution upon said judgment was thereafter and on the . . . day of . . ., 19. . , duly issued to L. M., sheriff of . . . county, and that said sheriff, by virtue of said execution, thereafter duly levied upon the following-described real estate: [describe same; also, here state fully the proceedings upon execution, the sale of the premises, and execution and delivery of the sheriff's deed to the petitioner];

That on the said . . . day of . . ., 19. . , the said N. O., [party in possession] was, and now is, in possession of said premises;

That on said . . . day of . . ., 19. . , your petitioner went upon said premises and exhibited his said sheriff's deed of said premises to said N. O., and then and there duly demanded of said N. O. the possession of said premises; but that he, the said N. O., refused, and still refuses, to surrender the same, or any part thereof; and your petitioner prays for a writ of assistance to remove said N. O. from said premises, and to put your petitioner in possession thereof.

Dated, . . ., 19. .

A. B., Petitioner.

[VERIFICATION.]

§ 2105. Notice of motion on foregoing petition.

Form No. 541.

[TITLE.]

In the matter of the petition of A. B. for a writ of assistance. } ss.

To N. O., Esq., [party in possession].

Take notice, that the petition, of which a copy is herewith served on you, will be presented to the Hon. R. S., circuit judge, at his chambers in the city of . . ., in said county, on the . . . day of . . ., 19. . , at . . . o'clock A. M. of that day [or, to the circuit court

of . . . county, at the courthouse in . . ., on the . . . day of . . ., 19. . , at the opening of court on said day], or as soon thereafter as counsel can be heard, and the undersigned will then and there move upon said petition [if other affidavits are used: and upon the affidavits of J. K. and L. M., hereto annexed] for a writ of assistance as prayed in said petition.

[DATE.] E. F., Attorney for said A. B.

§ 2106. Order for writ of assistance.

Form No. 542.

[TITLE.]

On reading and filing the verified petition of P. Q., setting forth that he was the purchaser of the premises described in the complaint herein; that he has presented to the defendant, C. D., the sheriff's deed for said property, and demanded possession thereof, and that said C. D. has refused to deliver to him possession of said premises, and it appearing that due notice has been given of this motion to Messrs. . . ., the attorneys of said defendant; now, on motion of . . . , on behalf of said P. Q., it is ordered that a writ of assistance issue to the sheriff of . . . county, to put the said P. Q. in possession of the said premises, and him in the possession thereof from time to time to maintain and defend.

§ 2106a. Writ of assistance.

Form No. 543.

[TITLE.]

The People of the State of . . . to the Sheriff of the . . . County of . . ., greeting:

Whereas, by a certain decree or judgment of our superior court of the state of . . ., in and for the said county of . . ., in a certain action there pending between A. B., plaintiff, and C. D., defendant, made at a term of said court, held at . . ., in the said county of . . ., on the . . . day of . . ., 19. . , in and for the said county of . . ., before the Hon. J. K., judge of the said court, it was, among other things therein contained, adjudged and decreed by the said court that the purchaser at the sale therein described should, on the production of the sheriff's deed for said premises, be forthwith put in possession of a certain piece or parcel of land situate in the said . . . county of . . ., state of . . ., and therein described as follows, to-wit: [describe premises];

And whereas, time for redemption has expired, and the said sheriff's deed has been duly executed and delivered to C. L., who was the purchaser at said sale, yet the said C. L. has not been let into nor taken possession of the said piece of land, or of any part thereof, according to the tenor of the said decree;

And whereas, the said piece of land is in the tenure and occupation of R. D.;

And whereas, by an order of said court made in the said action on the . . . day of . . ., 19.., it was ordered that our writ of assistance should issue to you, the said sheriff, to put the said C. L. in possession of the said piece or parcel of land, and him in possession thereof from time to time to maintain and defend:

Therefore, we command you, that immediately after receiving this writ, you go to and enter upon the said piece or parcel of land, and that you eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said C. L., and that you put and place the said C. L. or his assigns in the full, peaceable, and quiet possession of the said piece or parcel of land, without delay, and him, the said C. L., in such possession thereof from time to time maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of the said decree and order of the said court.

Witness, Hon. J. K., judge of the said superior court, at . . ., in the said county of . . ., and the seal of said court, this . . . day of . . ., 19..

R. S., Clerk.

By N. O., Deputy Clerk.

[SEAL.]

§ 2107. Execution directing sale of real property attached in the action.

Form No. 544.

[TITLE.]

The People of the State of . . ., to the Sheriff of the County of . . ., greeting:

Whereas, judgment was rendered on the . . . day of . . ., 19.., in an action in the . . . court for . . . county, between A. B., plaintiff, and C. D., defendant, in favor of said plaintiff, and against said defendant, for the sum of . . . dollars, damages and costs, as appears by the judgment-roll filed in the office of the clerk of said court, in said county of . . .;

And whereas, the said judgment was docketed in your county on the . . . day of . . ., 19.., and the sum of . . . dollars is now actually due and unpaid thereon, besides interest;

And whereas, the following described real property of said defendant was duly attached in this action on the . . . day of . . ., 19.., under a writ of attachment theretofore issued herein, to-wit: [describe property]:

Therefore, we command you, that you satisfy the said judgment with interest [and taxes so paid] out of the personal property of said judgment debtor within your county; or if sufficient personal property cannot be found, then that you sell all of the interest which the defendant had in such real estate at the time it was so attached or at any time hereafter; and return this execution within sixty days, etc.

§ 2108. Bond staying execution.

Form No. 545.

[TITLE.]

We, O. P. and R. S., of . . ., county of . . ., state of . . ., hereby acknowledge ourselves security for the above-named defendant for the payment of that certain judgment rendered in the above-named court in this action . . ., 19.., in favor of the plaintiff, and against the defendant, for the sum of . . . dollars, for the purpose of a stay of execution on said judgment for the term of . . . months, and we hereby bind ourselves jointly and severally to pay the said judgment with interest and accruing costs at or before the expiration of said . . . months; and in default thereof, at the expiration of said stay, we authorize the clerk of said court to issue execution against us as provided by law.

[DATE.]

O. P.
R. S.

[VENUE.]

O. P. and R. S., being each duly sworn, each for himself says: That he is a resident and freeholder of the state of . . ., and that he owns property in this state not exempt from execution, and aside from incumbrance thereon, to the value of . . . dollars. [Total sum must be twice the amount of the judgment.]

[JURAT.]

O. P.
R. S.

[Approval thereon:] The within bond and the sureties thereon approved by me this . . . day of . . ., 19..

J. K., Clerk.

§ 2109. Affidavit for issuance of execution on Sunday.

Form No. 546.

[TITLE.]

[VENUE.]

A. B., being duly sworn, says: That he is the plaintiff in the above-entitled action, and that judgment was rendered therein in favor of the plaintiff, and against the defendant, on the . . . day of . . ., 19.., and that said judgment remains wholly unsatisfied [or, unsatisfied as to the sum of . . . dollars]; that affiant verily believes that he will lose his said judgment unless process by execution issue on this . . . day of . . ., 19.., being Sunday.

[JURAT.] A. B.

§ 2110. Notice of sale on execution—General form.

Form No. 547.

SHERIFF'S SALE.

By virtue of an execution, issued out of and under the seal of the . . . court in and for the county of . . ., and state of . . ., upon a judgment rendered and docketed in the said court, on the . . . day of . . ., 19.., in an action wherein A. B. is plaintiff, and C. D. is defendant, in favor of the said plaintiff, and against the said defendant, for the sum of . . . dollars, which execution was directed and delivered to me as sheriff in and for said county of . . ., I have levied upon all the right, title, and interest of the said defendant, C. D., in and to the following described real property, to-wit: [describe property; if the property to be sold be personal property, describe the same so that it may be identified]:

Notice is hereby given, that I, the undersigned, sheriff as aforesaid, will sell the above-described real [or, personal] property to the highest bidder, for cash, at public auction, at the [name place], in the city of . . ., in the county of . . ., and state of . . ., on . . ., the . . . day of . . ., 19.., at . . . o'clock .. M., of that day, to satisfy the said execution, together with the interest and costs thereon.

Dated . . ., 19.. L. M., Sheriff of . . . County.

§ 2111. Sheriff's certificate of redemption from execution sale.

Form No. 548.

Know all men by these presents, that I, L. M., sheriff of . . . county, state of . . ., do hereby certify, that on the . . . day of

. . ., 19.., C. D., of . . ., in said county, duly exhibited to me the evidences required by law of his right to redeem the real property hereinafter described as judgment debtor in the action hereinafter named [or, as creditor of the judgment debtor, etc.], and did on said day duly redeem said real property from a sale of the same made on the . . . day of . . ., 19.., by the sheriff of said . . . county, which sale was made under and by virtue of a certain execution duly issued and delivered to said sheriff on the . . . day of . . ., 19.., out of the . . . court of . . . county, state of . . ., to enforce the final judgment in an action in said court wherein A. B. was plaintiff and C. D. was defendant, and that in making such redemption he duly paid to me on the day first named the sum of . . . dollars in lawful money, that being the full sum required by law to redeem said real property from said sale. Said property so redeemed is described as follows, to-wit: [Insert description.]

In witness whereof, I have hereunto set my hand this . . . day of . . ., 19..

L. M., Sheriff of . . . County.

[CERTIFICATE OF ACKNOWLEDGMENT.]

§ 2112. Return—Execution satisfied.

Form No. 549.

[TITLE OF COURT AND CAUSE.]

I hereby certify, that I received the annexed execution on the . . . day of . . ., 19.., and by virtue thereof recovered from the therein-named judgment debtor the sum of $ . . ., and, after deducting my fees and commission of $ . . ., I applied the balance of $ . . . in satisfaction of said execution, as will more fully appear by receipt of the plaintiff indorsed thereon and made a part hereof, and I hereby return the said execution satisfied in full.

§ 2113. Return—Levy on credits, etc.

Form No. 550.

[TITLE OF COURT AND CAUSE.]

Office of Sheriff of . . . County, California.

I, . . ., sheriff of the county of . . ., California, do hereby certify: That, by virtue of the annexed writ, I duly attached [or, levied on] all moneys, goods, credits, effects, debts due or owing, or any other personal property in the possession or under the control

of the parties hereinafter named, at the time set opposite to their respective names, belonging to the defendants named in said writ, or to either of them, by delivering to and leaving with each of said parties hereinafter named, personally, in the said county of . . ., a copy of said writ, with a notice in writing that such property was attached [or, levied upon], and not to pay over or transfer the same to any one but myself.

STATEMENT DEMANDED.

[Then follows schedule of names, time of service, and the answers made.]

§ 2114. Return—Sale of real estate.

Form No. 551.

[TITLE OF COURT AND CAUSE.]

Office of the Sheriff of . . . County, California.

I, . . ., sheriff of the county of . . ., California, hereby certify:

That, by virtue and in pursuance of the annexed order of sale, I advertised the property described in said order, and as follows, to-wit: [description], to be sold by me in front of the courthouse, in . . ., on the . . . day of . . ., 19.., at . . . o'clock, . . .;

That previous to said sale I caused due and legal notice thereof to be published once a week for three weeks successively, immediately before said sale, in the . . ., a . . . newspaper published in . . ., said county of . . ., and caused said notice to be posted in three of the most public places in . . ., said places of publication and of posting being in the township in which said property is situated, and caused said notice to be posted in three of the most public places in . . ., the same being in the township wherein said sale was advertised to take place, and all of which notices were posted for the same period of time preceding the date fixed for said sale;

That on the . . . day of . . ., 19.., the day on which said premises were so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and exposed the said premises for sale in [one] parcel, at public auction, according to law, to the highest bidder for cash, in United States [gold coin], when . . ., being the highest bidder therefor, the said premises were struck off by me to the said . . ., for the sum of . . . dollars, [gold coin] of the United States, which was the whole price bid, and which I acknowledge to have received;

That I delivered to said purchaser a certificate of said sale, and filed a duplicate thereof in the office of the county recorder of the said county of . . . .

. . ., Sheriff of . . . county, State of California.
[or, Commissioner appointed by said court.]

§ 2115. Complaint against sheriff—For neglecting to return execution.

Form No. 552.

I. That at the time of the issuing of the execution hereinafter mentioned, the defendant was the sheriff of the county of . . ., in this state.

II. That on the . . . day of . . ., 19.., in an action in the . . . court for the county of . . ., state of . . . [or other court; or, before J. K., a justice of the peace in and for the township of . . ., in the county of . . ., in this state], wherein this plaintiff was plaintiff and one M. N. was defendant [or otherwise], the plaintiff recovered a judgment, duly given by said court, against the said M. N. for . . . dollars [or, where the judgment was in a justice's court: duly given by said justice against said M. N. for . . . dollars, which judgment was thereafter duly docketed in the office of the clerk of the . . . court of . . . county. Or otherwise, as required by statute.]

III. That on the . . . day of . . ., 19.., an execution against the property of said M. N. was duly issued to this plaintiff on said judgment, and directed and then delivered to the defendant, as sheriff of the county of . . ., of which execution the following is a copy [copy of the execution and indorsement; or state its substance, e. g. thus: whereby said defendant was directed to satisfy said judgment out of the personal property of said M. N. in said . . . county; or if sufficient personal property could not be found, out of the real property belonging to him on the day when said judgment was docketed in said . . . county, or at any time thereafter, and return said execution to . . . within sixty days after the receipt thereof by him].

IV. That although [more than] sixty days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, to the damage of the plaintiff in the sum of . . . dollars.

Wherefore, etc.

§ 2116. The same—For neglecting to levy.

Form No. 553.

I, II, and III. [As in preceding form.]

IV. That although at the time of the said delivery of the execution to the defendant there was within said county personal property [or, real estate] belonging to the defendant, to-wit: [designate it briefly], out of which the defendant might have satisfied the execution, of which property he then and there had notice; nevertheless, in violation of his duty as such sheriff, he failed to levy the moneys or any part thereof, as by said execution he was required to do, to the damage of the plaintiff in the sum of . . . dollars.

Wherefore, etc.

§ 2117. The same—For maliciously issuing execution on a paid judgment.

Form No. 554.

I. That on the . . . day of . . ., 19.., in the . . . court of . . . county, the defendant recovered judgment against the plaintiff for the sum of . . . dollars, said judgment the plaintiff fully paid on the . . . day of . . ., 19..

II. That on the . . . day of . . ., 19.., the defendant, well knowing that said judgment had been paid willfully and maliciously and with intent to injure the plaintiff, caused an execution to be issued out of said court thereon and delivered to the sheriff of . . . county.

III. That the said sheriff, by virtue of the command of said execution, on the . . . day of . . ., 19 . ., seized and levied upon certain property of the plaintiff [describing same], of the value of . . . dollars, and thereafter sold the same, whereby said property has become wholly lost to the plaintiff.

IV. That plaintiff has been damaged by reason of the premises in the sum of . . . dollars.

Wherefore, etc.

CHAPTER LXXIV.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

§ 2118. In general.—A proceeding supplementary to execution is merely auxiliary to the original action, and the court will take judicial notice of the record.[1] There are three classes of cases provided for in which proceedings supplementary to the execution may be had: 1. Where an execution against property of a judgment debtor is returned unsatisfied in whole or in part, the judgment creditor at any time after the return is entitled to an order requiring the judgment debtor to appear before such judge or a referee to answer concerning his property, but cannot be required to attend out of the county where he resides, or in which he has a place of business.[2] If the execution has been returned unsatisfied, process may be had under section 714 of the California Code of Civil Procedure without an affidavit.[3] No equitable circumstances need be shown to justify suit.[4] This proceeding is based upon the return of the execution, and no proof of property seems to be necessary. 2. After the issuing of an execution against property, and upon proof by affidavit of the party or otherwise to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, the judgment debtor may in like manner be required to appear and answer.[5] This proceeding is based on the proof of the existence of property, and no return of execution is necessary, but only that one shall have been issued against property; and it would seem that this proceeding was intended to be in aid of an existing execution. A judgment creditor is not even required to levy on and sell tangible property of the judgment debtor before invoking the aid of supplemental proceedings, as the statute authorizes

1 Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533.

2 Cal. Code Civ. Proc., § 714; Alaska Codes, pt. 4, ch. 31, §§ 295-298; Ariz. Civ. Code, pars. 2584-2591; Idaho Rev. Codes, §§ 4504-4510; Mont. Rev. Codes, §§ 6848-6860; Nev. Comp. Laws, §§ 3335-3342; N. Mex. Comp. Laws, §§ 3107-3377; N. Dak. Code Civ. Proc., § 398; Utah Rev. Stats., §§ 3273, 3274; Wash. Bal. Codes, §§ 5312-5345, 5392; Wyo. Rev. Stats., §§ 3940-3948.

3 Collins v. Angell, 72 Cal. 513, 14 Pac. 135.

4 Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332.

5 Cal. Code Civ. Proc., § 715.

such proceedings on the issuing of an execution and proof that the judgment debtor has property subject to execution which he refuses to apply toward the satisfaction of the same.[6] Section 720 of the California Code of Civil Procedure makes no distinction between tangible property held by another and a debt claimed to be due the judgment debtor.[7] 3. After the issuing or return of an execution against property, upon proof by affidavit or otherwise to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear before him or a referee appointed by him and answer concerning the same.[8] After the issuing and before the return of an execution against property, any person indebted to the judgment debtor may pay the sheriff the amount of his debt or enough to satisfy the execution.[9]

Proceedings supplementary to execution, as provided in the California Practice Act, are proceedings which are a substitute in part for a creditor's action in the old practice;[10] and are regulated by statute, and are equally applicable to justices' courts.[11] Such proceedings, whether had before or after the return of the execution unsatisfied, are not in the nature of a new action.[12] A creditor's bill, used as a substitute for the statutory proceeding under the code, fails to state facts sufficient to constitute cause of action where the bill does not show that the remedies at law have been exhausted or that the execution has been returned unsatisfied.[13] Under the provisions of the code, the debtor of a judgment debtor may be fully examined

6 State v. Downing, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

7 Phillips v. Price, 153 Cal. 146, 94 Pac. 617.

8 Cal. Code Civ. Proc., § 717. See N. Y. Code Civ. Proc., §§ 2432-2471.

9 Cal. Code Civ. Proc., § 716. See N. Y. Code Civ. Proc., § 2446.

10 Adams v. Hackett, 7 Cal. 187; McCullough v. Clark, 41 Cal. 298; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120. See Sperling v. Calfee, 7 Mont. 514, 19 Pac. 204; Ryan v. Maxey, 14 Mont. 83, 35 Pac. 515.

11 Cal. Code Civ. Proc., § 905. As to how far these proceedings are deemed a new action, compare Davis v. Turner, 4 How. Pr. 190; Orr's Case, 2 Abb. Pr. 457; Dresser v. Van Pelt, 15 How. Pr. 19.

12 Collins v. Angell, 72 Cal. 513, 14 Pac. 135. As to their true nature, see, also, Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004; Williams v. Gallick, 11 Or. 337, 3 Pac. 469; Knowles v. Herbert, 11 Or. 54, 240, 4 Pac. 126; Gerton Carriage Co. v. Richardson, 59 N. Y. St. Rep. 654; Joyce v. Spafard, 9 Civ. Proc. Rep. 342; Smith v. Tozer, 42 Hun, 22.

13 Matteson & Williamson M. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042.

as to property, credits, money, or other assets in his possession or under his control. Witnesses may be examined and the judge may order any property of the judgment debtor, not exempt from execution or due to the judgment debtor, to be applied towards the satisfaction of the judgment.[14] But, however, if such property be claimed by the person holding the same, the plaintiff must resort to an action in the nature of a creditor's suit to determine the title and to secure possession of such property.[15] It is not necessary to join in the proceedings the defendant not served in the action.[16] They cannot, however, be had against corporations as judgment debtors in the action;[17] at least they are not applicable to insolvent corporations.[18] Proceedings may be instituted against a foreign corporation having no agent and doing no business in the state, and a receiver of its property may be appointed.[19] But where the proceedings are against third parties who are indebted to the judgment debtor, a corporation, or any officer or member thereof, may be required to appear and answer concerning such indebtedness.[20] A foreign consul cannot be required to submit to an examination.[21] Before supplementary proceedings can be instituted on the return of an execution, the creditor's remedy by execution must be really exhausted.[22] A levy of a second execution, if not sure to satisfy the debt, is no objection to supplementary proceedings under the first execution.[23]

§ 2119. **Jurisdiction.**—Proceedings supplementary to execution apply to justices' courts, the words "justice" and "constable" being substituted for the words "judge" and "sheriff." If the judgment debtor does not reside in the county wherein the judgment was entered, an abstract of the judgment, in the

14 Matteson & Williamson M. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042.

15 Cal. Code Civ. Proc., §§ 719, 720, as amended 1907.

16 Emery v. Emery, 9 How. Pr. 130.

17 Hinds v. Canandaigua etc. R. R. Co., 10 How. Pr. 487; Sherwood v. Buffalo etc. R. R. Co., 12 How. Pr. 136.

18 Hammond v. Hudson River Iron etc. Co., 11 How. Pr. 29.

19 Logan v. McCall Pub. Co., 140 N. Y. 447, 35 N. E. 655.

20 Cal. Code Civ. Proc., § 717; N. Y. Code Civ. Proc., § 2441. See Pendergast v. Dempsey, 18 Civ. Proc., Rep. 198.

21 Griffin v. Dominguez, 2 Duer, 656.

22 Pudney v. Griffiths, 6 Abb. Pr. 211; Spencer v. Cuyler, 17 How. Pr. 157; Nagle v. James, 7 Abb. Pr. 234.

23 Sale v. Lawson, 4 Sandf. 718; Fellerman's Case, 2 Abb. Pr. 155; Liliendahl v. Fellerman, 11 How. Pr. 528.

form prescribed by code section 897, may be filed in the office of the justice of any town, township, or city, wherein the defendant resides, and such justice may issue execution on such judgment, and may take and exercise such jurisdiction in proceedings supplemental to execution, as if such judgment were originally entered in his court.[24]

§ 2120. **Affidavit.**—The affidavit must show, as a jurisdictional fact, that the execution was against the property.[25] It need not state that the defendant has property. If the affidavit shows that the creditor is an assignee of the judgment, it sufficiently shows his right to proceed; or it may be in the name of the nominal plaintiff, for it is not a new suit.[26] On application for an order to examine a third party, an affidavit, following the alternative words of the statute, "has property, etc., or is indebted," is not sufficient.[27] The affidavit may, with permission, be amended to conform to the original proceeding.[28]

§ 2121. **Order.**—It is sufficient to confer jurisdiction on a return of execution unsatisfied, if it appear in respect to defendant's residence that the execution was issued to the sheriff of the county where he then resided and had a place of business, and the order must be made returnable "within the county to which the execution was issued."[29] Under this section, after an execution has been returned unsatisfied, the judgment creditor is entitled to an order directing the judgment debtor to appear and answer concerning his property, without making any affidavit therefor.[30] The preliminary order for the examination may be

24 Cal. Code Civ. Proc., § 905, as amended 1907.

25 People v. Hurlburt, 5 How. Pr. 446.

26 Hough v. Kohlin, 1 Code Rep. (N. S.) 232; Orr's Case, 2 Abb. Pr. 457; Ross v. Clussman, 3 Sandf. 676.

27 Lee v. Heirberger, 1 Code Rep. 38. As to sufficiency of affidavit, see, also, Tefft v. Epstein, 17 Civ. Proc. Rep. 168; Miller v. Adams, 52 N. Y. 409; Schenck v. Irwin, 60 Hun, 361; Batchelder v. Nugent, 23 Civ. Proc. Rep. 178; Collins v. Beebe, 27 N. Y. St. Rep. 4.

28 Murne v. Schwabacher, 2 Wash. T. 130, 3 Pac. 899.

29 Bingham v. Disbrow, 14 Abb. Pr. 251; Jesup v. Jones, 32 How. Pr. 191. But see Cal. Code Civ. Proc., § 714.

30 Collins v. Angell, 72 Cal. 513, 14 Pac. 135. As to the practice in New York, in procuring an order for the examination of third persons, see Ward v. Beede, 17 Abb. Pr. 1, 15 Abb. Pr. 373; Gibson v. Haggerty, 37 N. Y. 555, 97 Am. Dec. 752; Lynch v. Johnson, 46 Barb. 56. As to form of affidavit and order, see Seeley v. Garrison, 10 Abb. Pr. 460. See, also, as to contents of order, Day v. Brosnan, 6 Abb. N. C. 312; Milliken v. Thomson, 8 N. Y. St. Rep. 106; Shults v. Andrews, 54 How. Pr. 376.

made by the judge, and the final order requiring the satisfaction of the judgment may be made by the court.[31] The issuing and service of an order creates no lien as against other creditors who in the mean time discover other property subject to execution and levy upon the same.[32] Where a judgment debtor is examined on supplementary proceedings, the order made is binding and estops the parties from again litigating the same matter in another action. If property be ordered to be delivered to the sheriff for sale under the execution, no action can be maintained against the sheriff for so selling it.[33]

§ 2122. **Order forbidding debtor to transfer.**—The judge who makes an appointment of a receiver may make an order forbidding the debtor to transfer any debts or make other disposition of them until an opportunity be given the receiver to sue;[34] and on violation of the order he is liable to punishment, as for a contempt.[35] The only power of the court in proceedings supplementary to execution, in respect to an action by the judgment creditor, is to make an order authorizing such creditor to sue in the proper court to recover an indebtedness due to the judgment debtor, and to forbid a transfer pending the action, and such an order is not an adjudication of the rights of the parties.[36]

§ 2123. **Order for payment.**—An order requiring the application of property to the payment of a judgment may be in the alternative, that the defendant pay over, or that an attachment issue.[37] It is not incumbent upon the court to make express findings in special proceedings in aid of execution.[38] No formal issues are required to be framed in proceedings supplementary to execution.[39] Under the California practice, an appeal may be taken from an order made by a court or referee on proceedings supplementary to execution;[40] so also in Nevada;[41] but it seems that

31 State v. Downing, 40 Or. 309, 58 Pac. 863, 69 Pac. 917.

32 Becker v. Torrance, 31 N. Y. 631. Consult Voorhees v. Seymour, 26 Barb. 569; Duffy v. Dawson, 46 N. Y. St. Rep. 268, 50 N. Y. St. Rep. 584.

33 McCullough v. Clark, 41 Cal. 298.

34 Ball v. Goodenough, 37 How. Pr. 479.

35 People v. Kingsland, 3 Keyes, 325, 5 Abb. Pr. (N. S.) 90.

36 McDowell v. Bell, 86 Cal. 616, 25 Pac. 128; High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

37 Crouse v. Wheeler, 33 How. Pr. 337.

38 Lyons v. Marcher, 119 Cal. 382, 51 Pac. 559.

39 McCullough v. Clark, 41 Cal. 298, 302.

40 McCullough v. Clark, 41 Cal. 298.

41 Hagerman v. Tong Lee, 12 Nev. 331.

in New York such orders are discretionary, and an order denying an application for them is not appealable.[42]

§ 2124. Contempt.—If any person, party, or witness disobey an order of the referee, properly made, in proceedings before him under the code chapter, he may be punished by the court or judge for a contempt.[43] It is contempt to refuse on the ground that he is a witness attending on another court.[44] The fact that the order in proceedings supplemental to execution was voidable does not relieve from contempt proceedings for a failure to comply therewith where the court had jurisdiction of the proceedings at their inception.[45] The court will not punish a debtor for contempt in disregarding the order requiring an examination before a referee in supplementary proceedings where the same plaintiff had obtained a previous order against him on the same judgment, which was outstanding and not disposed of.[46] If the judge finds the defendant able to pay the judgment, and orders him to do so within a time specified, and also to pay the costs stated, the defendant, if he fails to comply, may be proceeded against as for a contempt.[47] For any disobedience to the order of the judge out of court, the court may punish by order to show cause or attachment.[48]

Where a judgment debtor, for the purpose of defeating the process of the court and an order directing him to turn over property to apply upon the judgment, had procured, upon his own motion, a delay in the proceedings, pending which he voluntarily and contumaciously disabled himself from complying with the order he anticipated being made, the court rightfully adjudged him guilty of contempt.[49] A person cited for contempt for failure to pay money found by the district court, on her examination in supplementary proceedings, to belong to the

42 Joyce v. Holbrook, 7 Abb. Pr. 338.

43 Cal. Code Civ. Proc., § 721. See Perkins v. Kendall, 3 Civ. Proc. Rep. 240; Fleming v. Tourgee, 21 Civ. Proc. Rep. 297, 16 N. Y. Supp. 2; Shults v. Andrews, 54 How. Pr. 378; N. Y. Code Civ. Proc., § 2457.

44 Page v. Randall, 6 Cal. 32.

45 State v. Downing, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

46 Brockway v. Brien, 37 How. Pr. 270. As to the proper method of obtaining the attendance of a witness upon a hearing in supplementary proceedings, consult People v. Dutcher, 3 Abb. Pr. (N. S.) 152.

47 Brush v. Lee, 6 Abb. Pr. (N. S.) 50.

48 Wicker v. Dresser, 4 Abb. Pr. 93. Compare Wicker v. Dresser, 14 How. Pr. 465.

49 Ex parte Kellogg, 64 Cal. 343, 30 Pac. 1030.

judgment debtor, cannot excuse a disobedience of the order by asserting that the money withheld does not belong to such debtor.[50]

§ 2125. **Examination of third persons.**—Sections 717, 718, and 719 of the California Code of Civil Procedure, relating to proceedings supplementary to execution, do not authorize the court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing, in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action.[51] No showing is required to the effect that a notice of garnishment has been served upon a person alleged to have the property of a judgment debtor.[52] Where it is evident that a garnishee, on examination under an order supplementary to execution, acts in bad faith in denying his indebtedness or asserting his claim, the referee may treat it as fraudulent and disregard it.[53]

§ 2126. **Liability of third parties.**—Where the defendant in an action, whose property has been attached by the sheriff, deposited with the sheriff a sum of money in gold coin in lieu of an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney, it was held that after plaintiff recovered judgment, the persons who borrowed the money did not hold in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings

50 In re Lewis, 67 Kan. 340, 72 Pac. 788.

51 Hathaway v. Brady, 26 Cal. 586; Rapp v. Whittier, 113 Cal. 429, 45 Pac. 703.

52 Carter v. Los Angeles Nat. Bank, 116 Cal. 370, 48 Pac. 332.

53 Parker v. Page, 38 Cal. 522. But see Hagerman v. Tong Lee, 12 Nev. 331.

supplementary to execution.[54] In order to bring a party within the terms of section 716 of the Code of Civil Procedure of California, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs.[55] If there is any dispute as to the ownership of the property, or if the third person proceeded against in good faith denies the debt, neither the judge nor the referee has power or authority to decide the disputed question and order the property delivered, or money paid in satisfaction of the judgment; the only course to pursue is to apply for an order forbidding any transfer or other disposition, and authorizing a suit.[56] The validity of the claims of lien creditors and mortgagees to the property in the receiver's hands can not be adjudicated in proceedings in aid of execution.[57]

§ 2127. Satisfaction of demand.—The plaintiff, in an action for a personal tort, after a verdict in his favor, and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnished under the execution issued on other judgments against the plaintiff, and paid to the sheriff the amount of the judgment in favor of the plaintiff against him, who applied the same upon the executions. It was held that the assignment was void, and that the payment by defendant to the sheriff was a satisfaction of the judgment.[58]

§ 2128. Receiver may be appointed.—In proceedings in aid of execution, the appointment of a receiver to examine claims of lien creditors and mortgagees to the property, and make recommendations to the court concerning them, is improper, as it is a summary proceeding, and disputes between the debtor and third persons cannot be settled.[59] In proceedings supplementary to execution the court has power, when it has all parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment

54 Hathaway v. Brady, 26 Cal. 586.

55 Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655.

56 Under Nev. Comp. Laws, § 3341 (Cal. Code Civ. Proc., § 720); Hagerman v. Tong Lee, 12 Nev. 331.

57 First Nat. Bank v. Cook, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012; Ryland v. Arkansas City Mill Co., 19 Okla. 435, 92 Pac. 160.

58 Lawrence v. Martin, 22 Cal. 173.

59 First Nat. Bank v. Cook, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

debtor, or to such third person, as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt.[60] Where defendant is holder of a warrant on a society, the court should appoint a receiver to take and cash the warrant and apply it to the satisfaction of the judgment.[61]

The presumption that defendant has certain money because he had that money three months prior, and no showing is made that he has disposed of it, is not sufficient to sustain an order for him to pay the judgment from that money.[62] A receiver, pending an appeal, pays over the money in his possession, at his own peril.[63] One buying mortgaged chattels at a receiver's sale is bound to take notice that the receiver had no notice of the sale.[64]

§ 2129. **Witnesses.**—Witnesses may be required to appear and testify before the judge or referee upon any proceeding under the code in the same manner as upon the trial of an issue.[65]

§ 2130. **What property may be reached.**—Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession, or in the possession of another party, which is conceded to belong to the defendant. A plaintiff obtaining judgment, after attaching property in the hands of another, must move directly against the pledgee, who claims such property, not under section 3226 of the Compiled Laws of Nevada, but by

60 Hathaway v. Brady, 26 Cal. 586; Flood v. Libby, 38 Wash. 366, 107 Am. St. Rep. 851, 80 Pac. 533. As to proceedings therein, consult Bloodgood v. Clark, 4 Paige, 574; Fitzburgh v. Haveringham, 6 Paige, 29; Browning v. Bettis, 8 Paige, 568; Kemp. v. Harding, 4 How. Pr. 178; Dorr v. Noxon, 5 How. Pr. 29; Myres' Case, 2 Abb. Pr. 476; Todd v. Crooke, 4 Sandf. 694; People v. Hurlburt, 5 How. Pr. 446; Ball v. Goodenough, 37 How. Pr. 479; Kennedy v. Thorp, 3 Abb. Pr. (N. S.) 131; Strong v. Epstein, 14 Abb. N. C. 322; Morgan v. Von Kohnstamm, 60 How. Pr. 161; Sayles v. Best, 20 N. Y. Supp. 951; Grace v. Curtiss, 23 N. Y. Supp. 321, 3 Misc. Rep. 558; Terry v. Bange, 24 N. Y. 599. As to history of a receiver's powers under several statutes considered, see Hayner v. Fowler, 16 Barb. 300. See, also, Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Edmonston v. McLoud, 16 N. Y. 543.

61 In re Downey, 31 Mont. 441, 78 Pac. 772.

62 Hammer v. Downing, 41 Or. 234, 66 Pac. 916; State v. Gutridge, 46 Or. 215, 80 Pac. 98.

63 Johnson v. Joslyn, 47 Wash. 531, 92 Pac. 413.

64 Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

65 Cal. Code Civ. Proc., § 718; McCullough v. Clark, 41 Cal. 298. See Knowles v. De Lazare, 3 How. Pr. (N. S.) 35; Benjamin v. Myers, 3 N. Y. St. Rep. 284; Schwab v. Cohen, 13 N. Y. St. Rep. 709; N. Y. Code Civ. Proc., § 2460.

proceedings supplementary to the execution.[66] The judge has no power to try the question of title, where the property is in the hands of others who make claim to it.[67] The court has no authority to order the receiver to sell, for the purpose of paying the expenses of receivership, property adversely claimed by lienors and mortgagees not parties to the action.[68] Property held in trust for the support of the judgment debtor cannot be reached;[69] but property previously deposited in bank, under an account opened in his name "in trust," can be so reached.[70] The creditor can only reach moneys actually due, and not moneys to become due on a contingency or on an executory contract;[71] nor property acquired after commencement of the proceedings and which had already been paid out to another creditor;[72] nor the earnings accruing after the date of the order;[73] nor movables which the debtor assigned for the benefit of his creditors while the execution was in life in the sheriff's hands;[74] nor a right of action for a mere tort;[75] nor the interest of the debtor as a *cestui que trust*.[76] Proceedings supplemental to execution can reach choses in action arising from torts committed on the property of the judgment debtor which might be reached by a creditor's bill, and the court in such proceedings may authorize a suit by the judgment creditor to recover such choses in action.[77] Where the wife declares a homestead, and

66 Persing v. Reno Stock Brokerage Co. (Nev.), 96 Pac. 1054; Nev. Comp. Laws, § 3341.

67 Cal. Code Civ. Proc., § 720, as amended 1907; Hagerman v. Tong Lee, 12 Nev. 331; Stewart v. Foster, 1 Hilt. 505; Hall v. McMahon, 10 Abb. Pr. 103; Teller v. Randall, 40 Barb. 242; Crounse v. Whipple, 34 How. Pr. 333. See McDowell v. Bell, 86 Cal. 615, 25 Pac. 128; First Nat. Bank v. Cook, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

68 First Nat. Bank v. Cook, 12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083, 2 L. R. A. (N. S.) 1012.

69 Locke v. Mabbett, 2 Keyes, 457; Campbell v. Foster, 35 N. Y. 361; Manning v. Evans, 19 Hun, 500.

70 People v. Kingsland, 3 Keyes, 325, 5 Abb. Pr. (N. S.) 90.

71 McCormick v. Kehoe, 7 N. Y. Leg. Obs. 184.

72 Caton v. Southwell, 13 Barb. 335.

73 Campbell v. Foster, 16 How. Pr. 275.

74 Weed v. Pierce, 9 Cow. 728; Watrous v. Lathrop, 4 Sandf. 700.

75 Ten Broeck v. Sloo, 2 Abb. Pr. 234.

76 Scott v. Nevins, 6 Duer, 672; Stewart v. Foster, 1 Hilt. 505. As to what property may be reached, see Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; Collins v. Angell, 72 Cal. 513, 14 Pac. 135; Winters v. McCarthy, 2 Abb. N. C. 357; Rainsford v. Temple, 3 Misc. 294, 22 N. Y. Supp. 937; Serven v. Lowerre, 3 Misc. 113, 23 N. Y. Supp. 1052.

77 Staples v. May, 87 Cal. 178, 25 Pac. 346. As to order authorizing judgment creditor to sue, see High v. Bank of Commerce, 95 Cal. 386, 29 Am. St. Rep. 121, 30 Pac. 556, 103 Cal. 525, 37 Pac. 508; Deering v.

the husband effects an insurance on the dwelling, taking the policy in his name, and the dwelling is destroyed by fire, the sum due from the insurance company cannot be garnished by a creditor of the husband.[78] Money held by an officer not taken at the time of arrest, nor from the person of defendant, and having no connection whatever with the cause of arrest, and having come into possession of the officer with the consent and by the direction of the owner, is not held in official capacity, and the officer owes no official duty to dispose of it in such capacity; and such money may be reached by garnishment upon proceedings supplementary to execution.[79]

§ 2131. Arrest of judgment debtor.—Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge he may be ordered to enter into an undertaking, with sufficient surety, that he will attend, from time to time, before the judge or referee, as may be directed, during the pendency of the proceedings, and will not in the mean time dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.[80] This is a portion of the section which seems to be in aid of an existing execution, and must be accompanied by proof of property. Nothing is here said of the necessity of showing fraud; but it would seem to be necessary under the California constitution.

Richardson-Kimball Co., 109 Cal. 73, 41 Pac. 801.

78 Houghton v. Lee, 50 Cal. 101.

79 Coffee v. Haynes, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482.

80 Cal. Code Civ. Proc., § 715; N. Y. Code Civ. Proc., §§ 2437, 2440. See Netzel v. Mulford, 59 How. Pr. 452; Rohshand v. Waring, 1 Abb. N. C. 311.

FORMS IN PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

§ 2132. Affidavit for general discovery after execution returned unsatisfied.

Form No. 555.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says: That he is the plaintiff [or, the attorney for the plaintiff] in this action; that judgment was duly recovered herein by said plaintiff, and against said defendant, C. D., on the . . . day of . . . , 19.., for . . . dollars, damages and costs, in the . . . court of . . . county, and that said judgment was on the . . . day of . . . , 19.., at . . . o'clock . . . M., duly docketed in the office of the clerk of the . . . court for the county of . . . , state of . . . ; that execution upon said judgment against the property of said judgment debtor was on the . . . day of . . , 19.., duly issued and delivered to the sheriff of . . . county aforesaid; that said judgment debtor at the time of the issuing of said execution resided, and still resides, in said . . . county; and that the said sheriff has returned the said execution wholly unsatisfied [or, unsatisfied as to the sum of . . . dollars].

And this deponent further says that there is due and unpaid upon said judgment the sum of . . . dollars, and [if it is desired to obtain a restraining order meanwhile, set forth the facts justifying the same, e. g.] that said judgment debtor is about to convey away and dispose of his property with intent to avoid the payment of said judgment.

And deponent asks that an order be made requiring said judgment debtor to appear before the Hon. J. K., Esq., at some time and place in said order to be named, and answer concerning his property, and that said judgment debtor be forbidden from making any transfer of his property not exempt from execution, or from interfering therewith until further order.

[JURAT.] A. B.

§ 2133. Order to appear and answer, based on foregoing affidavit.

Form No. 556.

[TITLE.]

It appearing to me, by the affidavit of A. B., the plaintiff in this action, that an execution upon the judgment in the above-entitled action against the property of C. D., the judgment debtor therein, has been duly issued to the sheriff of . . . county, and returned wholly [or, in part] unsatisfied:

I do hereby require you, the above-named C. D., defendant aforesaid, to appear before me at my office [specify place with exactness], on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon, to answer on oath concerning your property; and to abide and perform such further or other order as may be made by me in the premises, and in the mean time, and until the further order to the contrary, you, the said C. D., are hereby enjoined and restrained from making any transfer or other disposition of your property not exempt by law from execution, and from any interference therewith.

[DATE.] J. K., [official title].

[Affidavit of service of above order.]

[VENUE.]

N. O., being duly sworn, says that he did, on the . . . day of . . . , 19.., at . . . , serve the above original order, and the affidavit thereunto annexed, on C. D., known by deponent to be the identical C. D. in said order named, by delivering to and leaving with him personally a true copy of the said order, and the affidavit thereunto annexed, [and at the same time showing to him the said original order, and the signature of the [name officer] who signed the same.]

[JURAT.] N. O.

§ 2134. Warrant of arrest of judgment debtor.

Form No. 557.

[TITLE.]

The State of . . . to the Sheriff of . . . County, greeting:

Whereas, a judgment was duly rendered in the above-entitled action, in favor of A. B., and against C. D., on the . . . day of . . . , 19.., in said court, and duly docketed in . . . county, on the . . . day of . . . , 19..;

And whereas, [recite facts as to the issuance and return or non-return of the execution and amount due on the judgment];

And whereas, proof has been furnished to the undersigned, showing to his satisfaction by the affidavit[s] of A. B. and N. O. that there is danger of the said C. D. leaving the state [or, concealing himself];

And whereas, proof has also been furnished to the satisfaction of the undersigned that said C. D., judgment debtor, has property, to-wit: [describe same], which he unjustly refuses to apply to such judgment:

Now, therefore, we do warrant and command you, that you arrest the said C. D., and bring him before the undersigned, a [give title of officer], at his office in . . ., in said county, to answer concerning his property.

Given under my hand, at . . ., in the county of . . ., this . . . Day of . . ., 19..

J. K., [official title].

E. F., Attorney for Plaintiff.

§ 2135. Subpœna for other witnesses.

Form No. 558.

The State of . . ., to [name witnesses]:

You, and each of you, are hereby required to be and appear before J. K., [give title of office], at his office in [designate place], on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon of said day, to give evidence in a certain examination there pending, concerning the property of C. D., a judgment debtor of A. B.

Given under my hand, at . . ., in said county, this . . . day of . . ., 19..

J. K., [title of office].

[Or, L. M., Clerk, . . . court.]

§ 2136. Affidavit and order for examination of judgment debtor, or of bailee or debtor of judgment debtor.

Form No. 559.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action.

II. On or about the . . . day of . . ., 19.., I recovered a judgment in said action in the superior court of the state of . . ., in and for the county of . . ., against C. D., the defendant in

said action, for . . . dollars, or thereabouts, for damages and costs, which judgment was duly entered and docketed in the office of the clerk of said court, in the said . . . county of . . . ; that an execution against the property of the said defendant was duly issued thereon, and delivered to the sheriff of said . . . county of . . .

III. That, as I am informed and verily believe, the said C. D. has property which he unjustly refuses to apply towards the satisfaction of said judgment, to-wit: [Designate property.]

IV. That, as I am informed and verily believe, E. F. has property belonging to said judgment debtor [or is indebted to the said judgment debtor], in an amount exceeding fifty dollars, to-wit: in the sum of . . . dollars.

[JURAT.] [SIGNATURE.]

§ 2137. Affidavit for order of arrest.

Form No. 560.

[TITLE.]

[As in No. 559, to and including III.]

IV. And I further state that I have reason to believe, and do believe, that there is danger of the said C. D.'s absconding, and going beyond the reach of the process of this court, or without the limits of the state, with intent to defraud his creditors, and myself particularly; that my reasons for such belief are as follows: [State facts.]

[JURAT.] [SIGNATURE.]

§ 2138. Order for appearance of debtor.

Form No. 561.

[TITLE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that an execution was duly issued against the property of C. D., the defendant in the above-entitled action, upon the judgment recovered therein, and that said C. D. has property which he unjustly refuses to apply towards the satisfaction of the judgment in said action, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said superior court of the county of . . . , state of . . . , do hereby order and require the said defendant, C. D., personally to be and appear before G. H., the

referee by me hereby appointed for that purpose, at his office in . . . , in the county of . . . , on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon of that day, to answer concerning his property; and that a copy of said affidavit and of this order be previously served upon said defendant, C. D.

[DATE.] [SIGNATURE.]

§ 2139. Order for appearance of bailee or debtor of judgment debtor.

Form No. 562.

[TITLE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that A. B. has property of the judgment debtor therein mentioned, and is indebted to him in an amount exceeding fifty dollars, to-wit: in the sum of . . . dollars, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said superior court of the county of . . . , state of . . . , do hereby order and require the said A. B. personally to be and appear before E. F., the referee by me hereby appointed for that purpose, at his office in . . . , in the county of . . . , on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon of that day, to answer concerning any property of the said judgment debtor in his possession, and concerning any debts due by him to the said judgment debtor; and that a copy of said affidavit and of this order be previously served upon said defendant, and upon said A. B.

[DATE.] [SIGNATURE.]

§ 2140. Certificate of referee.

Form No. 563.

[TITLE.]

Examination of the defendant, C. D., in proceedings supplementary to execution in this action, taken before R. F., Esq., referee appointed by [name officer] to take the same, on the . . . day of . . . , 19..

The said referee having administered the oath to the said [defendant] C. D., he did thereupon depose and say as follows:

[Here follows the deposition.] C. D.

I hereby certify that the above, [with schedule A annexed] is the testimony, and the whole of the testimony, of the defendant,

C. D., given on the examination pursuant to the annexed order in supplementary proceedings, this . . . day of . . . , 19..

R. F., Referee.

§ 2141. Order that judgment debtor deliver specific property.

Form No. 564.

[TITLE.]

It appearing to me, from the foregoing examination of C. D., the judgment debtor herein, and of N. O., a witness, that the said judgment debtor has the following-described property in his possession not exempt from execution, to-wit: [Describe property.]

Now, on motion of E. F., plaintiff's attorney,

It is ordered, that the said C. D. forthwith [or, within a stated time to be named] deliver over to L. M., the sheriff of . . . county, the above-described property, to be applied on the judgment in this action.

[DATE.] J. K., [official title].

[This order is to be made only when the execution is still in the hands of the sheriff. If the execution has been returned, a receiver should be appointed, and the debtor ordered to deliver the property to the receiver.]

§ 2142. Order appointing receiver.

Form No. 565.

[TITLE.]

Whereas, on the . . . day of . . . , 19.., the above-named plaintiff presented to me an affidavit stating that [here recite facts stated in the affidavit].

And whereas, pursuant to an order [or, warrant of arrest] made by the undersigned, the said C. D. has been examined before me and answered concerning his property, which examination [together with the examination of N. O., a witness] has been reduced to writing, and it appearing therefrom that said C. D. has property not exempt from execution which should be applied to the payment of said judgment, and that one Q. R. is alleged to have possession of such property, and claims title thereto or an interest therein adverse to said C. D. [or, is alleged to be indebted to said C. D.].

And whereas, it further appears by the oath of said A. B. that no other supplementary proceedings are pending against said C. D.:

On motion of . . . [plaintiff's] attorney,

It is ordered, that R. C., of . . . , be and he is hereby appointed receiver of the debts, property, equitable interests, rights, and things in action, of the said judgment debtor, with the usual powers of receivers in such cases, upon his filing a bond with, and executed to, the clerk of this court, in the penal sum of . . . dollars, with sufficient surety, conditioned for the faithful discharge of his duties, in the usual form.

[DATE.] J. K., [title of officer].

§ 2143. Affidavit of non-attendance, as a foundation for contempt proceedings.

Form No. 566.

[TITLE.]

[VENUE.]

E. F., being duly sworn, says: That he is the attorney for the plaintiff herein; that he did, on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon, attend before the Hon. J. K., [give official title; or, before R. F., Esq., the referee named in the annexed order], at [name place where examination was ordered to be held], and there remained for one hour, prepared to take the examination of C. D., pursuant to the annexed order; that during that time the said C. D. failed to appear before the said judge [or, referee], at the place aforesaid, nor did any one appear, and thus disobeyed the annexed order; and deponent further says that at said time and place he caused the default of the said C. D. to be noted by the proper officer [or, said referee].

[JURAT.] E. F.

§ 2144. Affidavit of failure to deliver money or property, as a foundation for contempt proceedings.

Form No. 567.

[TITLE.]

[VENUE.]

E. F., being duly sworn, says: That he is the attorney for the plaintiff in the above-entitled action; that in the course of certain supplementary proceedings in this action an order was duly made by [name officer], requiring the said C. D. [state requirements

of order], which was duly served upon said C. D. on the . . . day of . . . , 19.., as appears by the affidavit of service indorsed thereon and herewith submitted, which order is annexed to this affidavit and made part hereof; that said C. D. has wholly refused, and still refuses, to obey said order, and refuses to deliver over said property [or, otherwise, specifically state the default], although due demand has been made on him so to do, and declares that he will not comply with said order.

[JURAT.] E. F.

§ 2145. Attachment for contempt against judgment debtor failing to appear as ordered.

Form No. 568.

The People of the State of . . . to the Sheriff of . . . County, greeting:

Whereas, it has been made to appear that A. B., plaintiff, duly recovered judgment against C. D., defendant, in the . . . court of . . . county, on the . . . day of . . . , 19.. , in an action then pending therein, for . . . dollars damages and costs; that said judgment was duly docketed in said county on the . . . day of . . . , 19.. ; that execution was duly issued out of said court to the sheriff of . . . county on said judgment on the . . . day of . . . , 19.. , which execution has been returned unsatisfied; and that said C. D. at all of the times above named resided, and still resides, in said county of . . . ; [or had a place of business in said county.]

And whereas, it further appears that on the . . . day of . . . , 19.. , an affidavit was duly made and sworn to by E. F., the attorney for the plaintiff in said action, stating the fact of the rendition of said judgment, the due issue and return of said execution, and that there was due and unpaid on said judgment the whole amount thereof, to-wit, the sum of . . . dollars and interest [or, a part thereof, stating what part];

And whereas, upon said affidavit, an order was duly issued by the undersigned on the . . . day of . . . , 19.. , requiring the said C. D. to appear before the undersigned on the . . . day of . . . , 19.. , at . . . o'clock in the forenoon, at [state place as in order], within said county of . . . , and answer concerning his property;

And whereas, said order was duly served on the said C. D. on the . . . day of . . . , 19.. , at . . . , by delivering to and leaving with him personally, a true copy thereof, and of the affidavit upon which

the same was founded, [and at the same time showing him the said original order with my signature thereto signed;] all of which appears to my satisfaction, by the affidavit of E. F., now on file in this proceeding;

And whereas, the said C. D. did not appear before me at the said time and place designated in said order, although the said plaintiff attended there by his attorney, E. F., and after waiting then and there for one hour after the hour designated in the said order for the appearance of said C. D., and he not appearing, and being then and there called before me, and failing to appear, in disobedience of said order, and the attorney of the plaintiff having moved that an attachment be issued against him, the said C. D., judgment debtor, to answer touching the contempt aforesaid, in failing to appear before me, as required by said order so made by me, bearing date the . . . day of . . ., 19.. :

Now therefore, you are hereby required and commanded, to attach the said judgment debtor so that you have his body before me, at the [state place], in said county, forthwith, then and there to answer touching the contempt aforesaid, and further to perform and abide such order as shall then be made in his behalf, and have you then and there this writ.

Given under my hand at a . . ., in said county, this . . . day of . . ., 19..

J. K., [official title].

§ 2146. Order adjudging debtor guilty of civil contempt.

Form No. 569.

[TITLE.]

An attachment having been issued by me in this action and proceeding on the . . . day of . . ., 19.. , against C. D. for an alleged contempt in disobeying an order made herein on the . . . day of . . ., 19.. , and duly served on him on the . . . day of . . ., 19.., requiring him, the said C. D., to [state act required], and the sheriff, pursuant to said writ, having brought the said C. D. before me to answer touching said contempt; and the said C. D. having been given full opportunity to purge himself of said alleged contempt [and having been examined before me], E. F., Esq., appearing for the judgment creditor in said action, and G. H., Esq., for said C. D.:

It is hereby ordered and adjudged, that said C. D. has been guilty of a willful contempt in disobeying the order made by me in this

action on the . . . day of . . ., 19.., by [state manner of disobedience], and that said disobedience was calculated to and did defeat, impair, and prejudice the rights of the said A. B., plaintiff herein, to his loss and injury.

And it is further ordered and adjudged, that as punishment for said contempt the said C. D. be committed to the common jail of said county, there to be imprisoned until he shall have obeyed said order, by [state act to be performed], and that a commitment issue for the execution of this order.

[DATE.] J. K., [official title].

§ 2147. Commitment thereon.

Form No. 570.

The People of the State of . . . to the Sheriff of the County of . . . ., greeting:

Whereas, [here recite recovery of original judgment, issue, and return of execution, issuance of the order in supplementary proceedings, and the proceedings thereon, the order made and the fact of the defendant's disobedience, the issue of the writ of attachment, the hearing thereon, and the judgment]:

Now therefore, you, the said sheriff, are hereby commanded, that you commit the said C. D. to the common jail of said county of . . ., and there imprison him, until he shall have obeyed said order dated . . ., 19.. [here specify act to be done], or until he shall be discharged pursuant to law.

Given under my hand, this . . . day of . . ., 19..

J. K., [official title].

CHAPTER LXXV.

CREDITORS' SUITS.

§ 2148. Creditor's suit defined.—A creditor's suit is a continuation of the suit at law, as it merely seeks to obtain the fruits of the judgment, or to remove obstacles to the remedy at law.[1] A creditor's bill is a proceeding *in rem*, and its use is to make effective a judgment against the property of the debtor which is in some way concealed.[2]

§ 2149. Compared with the code provisions.—The Code of Civil Procedure of California, and in fact all the codes, provide for proceedings supplementary to execution, which take the place of the former action for discovery. Under these proceedings the debtor may be examined, and witnesses required to appear and testify, and the judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of the debtor or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. This order, of course, only applies to those cases where it is conceded that the money or property belongs to the judgment debtor. But if the person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him or denies the debt, the court or judge may, by an order, authorize an action to be brought by the creditor against such person or corporation for the recovery of such interest or debt, and in the mean time restrain any transfer or disposition of the debt or interest.[3] These provisions cover the whole field; and sections 4 and 8 of the same code would seem to restrict the remedy in such cases to those provided by the code. Sections 719 and 720 of the California Code of Civil Procedure, as amended in 1907, seem to make it necessary to resort to a creditor's suit, where money or property in the hands of another person, or claimed to be due from him to the judgment debtor, or an interest

1 Hatch v. Dorr, 4 McLean, 112, Fed. Cas. No. 6206. See Spelman v. Freedman, 130 N. Y. 421, 29 N. E. 765; Vail v. Hammond, 60 Conn. 374, 25 Am. St. Rep. 330, 22 Atl. 954.

2 Houghton v. Axelsson, 64 Kan. 274, 67 Pac. 825.

3 Code Civ. Proc., §§ 714-721.

therein is claimed by the party holding the same adverse to the judgment debtor. A judgment creditor is entitled to maintain a creditor's bill without first pursuing the statutory proceedings supplementary to execution, which gives him a right to sue only under section 720.[4] And a complaint by a judgment creditor who has obtained from the court or judge the proper order against one who claims to own the property alleged to be the debtor's, or who denies an indebtedness to the judgment debtor, must substantially conform to the old practice.[5] It is held in some of the states that the statutory remedy by proceedings supplementary to execution was intended as a substitute for a creditor's bill as formerly used in chancery.[6] In other states, it is held that the creditor may still resort to his remedy by creditor's suit.[7]

§ 2150. Party plaintiff.—When the question is one of a common or general interest, or it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.[8] The provisions of this section are intended to apply exclusively to suits in equity.[9] The rule requiring all persons materially interested to be made parties is dispensed with when it is impracticable or inconvenient, as in case of joint associations composed of numerous individuals. In such case, the statute authorizes one to sue for all.[10] In such an action, when an injunction is sought, the plaintiff must allege in his complaint that he sues as well on behalf of himself as on behalf of all others equally interested with him;[11] or for the benefit of those interested who

4 Phillips v. Price, 153 Cal. 146, 94 Pac. 617.

5 For proceedings supplementary to execution, under the provisions of the code above referred to, see that title, ante, chap. LXXIV. See, also, "An act for the relief of insolvent debtors, and protection of creditors," approved May 4, 1852, and an act supplementary thereto, approved March 31, 1876; act of March 26, 1895.

6 Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120; Habenicht v. Lissak, 78 Cal. 357, 12 Am. St. Rep. 63, 20 Pac. 874, 5 L. R. A. 713; Herrlich v. Kaufmann, 99 Cal. 275, 37 Am. St. Rep. 50, 33 Pac. 857; Hexter v. Clifford, 5 Colo. 168.

7 Feldenheimer v. Tressel, 6 Dak 265, 43 N. W. 94; Enright v. Grant, 5 Utah, 334, 15 Pac. 268; Hart v. Albright, 28 Abb. N. C. 74, 18 N. Y. Supp. 718; Allen v. Fritch, 5 Colo. 222.

8 Cal. Code Civ. Proc., § 382; N. Y. Code Civ. Proc., 1877, § 448; Idaho Rev. Codes, § 4105; Arizona Rev. Stats., par. 1313, § 104; Wash. Bal. Codes, § 263; Smith v. Lockwood, 1 Code Rep. (N. S.) 319; Wood v. Draper, 24 Barb. 187, 4 Abb. Pr. 322.

9 Andrews v. Mokelumne Hill Co., 7 Cal. 330.

10 Gorman v. Russell, 14 Cal. 531.

11 Smith v. Lockwood, 1 Code Rep. (N. S.) 319; Wood v. Draper, 24 Barb. 187, 4 Abb. Pr. 322.

may "come in and contribute to the expenses," or "for the benefit of the whole."[12] The language of the code, "for the benefit of all," is sufficiently stated in the above allegation: "All" "who come in and contribute to the expenses."[13] The code provides that "those who are united in interest must be joined as plaintiffs"; but it also, in the same section, provides that "when the question is one of common or general interest one or more may sue for all," thus creating a distinction in the terms "united in interest" and "common interest."[14] An averment in the creditor's bill that the plaintiff sued on behalf of other creditors who may come in and be made parties to the action is immaterial and redundant surplusage.[15] Thus, in the case of legatees having a common interest, one may sue in behalf of himself and the others, and all may avail themselves of the decree.[16] Otherwise, however, where the interest of several parties are united, in which case all must be joined.[17] Where a member of an incorporated association sues the president or other chief officers for an accounting concerning the property of the association, or for a fraudulent breach of trust in respect thereto, all the members of the association must be made parties, or the plaintiff must sue for the benefit of all others standing in the same situation as himself.[18] "A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation."[19] This principle lies at the foundation of all "creditors' suits," so called, and which existed before the code.

In New York, no creditor can individually maintain an action against an individual stockholder for the share illegally distributed to him. The liability is to the creditors generally, and the action should be commenced by some party representing all the creditors.[20] A creditor's bill brought by two judgment creditors jointly, to reach the assets of a corporation, is not demurrable

12 Smith v. Lockwood, 1 Code Rep. (N. S.) 319; Wood v. Draper, 24 Barb. 187, 4 Abb. Pr. 322; Dennis v. Kennedy, 19 Barb. 517.

13 Id.

14 Cal. Code Civ. Proc., § 382.

15 Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

16 McKenzie v. L'Amoureaux, 11 Barb. 516. See, also, Brooks v. Peck, 38 Barb. 519.

17 Cal. Code Civ. Proc., § 382.

18 Warth v. Radde, 18 Abb. Pr. 396, 28 How. Pr. 230; Habicht v. Pemberton, 4 Sandf. 657.

19 Cal. Civ. Code, § 3441.

20 Osgood v. Laytin, 5 Abb. Pr. (N. S.) 1. Compare Harmon v. Page, 62 Cal. 448; Tatum v. Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136; Thompson v. Reno Sav. Bank, 19 Nev. 103, 3 Am. St. Rep. 797, 7 Pac. 68.

for misjoinder of parties plaintiff.[21] A grantee of land, who acquires title thereto prior to the commencement of an action in the nature of a creditor's bill against his grantor and his predecessors in interest, is not affected by the judgment therein, unless he is made a party to the action.[22] A fraudulent grantor is a proper party defendant in an action to subject to a lien of a judgment the property alleged to have been fraudulently conveyed, but he is not a necessary party.[23]

§ 2151. Parties to a deed of trust.—It is only the particular class who might have brought the suit who can come in.[24] Where a lien creditor seeks relief in equity, in behalf of himself and other creditors of the same class, the decree should provide for the relief of all.[25] All parties in the same manner affected, though in different degrees, may be joined.[26]

§ 2152. Allegation of issuance of execution.—In some of the states, the complaint must allege that an execution has been issued and returned unsatisfied in whole or in part.[27] An action in aid of a legal process, while closely allied to a creditor's bill proper, is clearly distinct therefrom, and in such action it is not necessary that an execution be issued and returned *nulla bona*.[28] In Ohio, this allegation is unnecessary. In that state, it is only essential to aver that the judgment debtor had no property liable to execution.[29] An allegation that an execution was duly issued and returned is held sufficient.[30] The return is conclusive that the remedy at law is exhausted.[31] But a general averment that the defendant was primarily liable is not enough to excuse the plain-

21 Baines v. West Coast Lumber Co., 104 Cal. 1, 37 Pac. 767.

22 Lange v. Braynard, 104 Cal. 156, 37 Pac. 868.

23 Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765. See Fox v. Moyer, 54 N. Y. 130; Coffey v. Norwood, 81 Ala. 512, 8 South. 199.

24 Parmlee v. Egan, 7 Paige, 610; Cooke v. Smith, 3 Sandf. Ch. 333.

25 Trustees of Wabash etc. Canal v. Beers, 2 Black, 448, 17 L. Ed. 327.

26 Vermeule v. Beek, 15 How. Pr. 333; Van Rensselaer v. Layman, 10 How. Pr. 505; Wandle v. Turney, 5 Duer, 661.

27 Miller v. Miller, 7 Hun, 208; McCullough v. Colby, 5 Bosw. 477. See § 2574, post.

28 Paulson v. Ward, 4 N. Dak. 100, 58 N. W. 792.

29 Bomberger v. Turner, 13 Ohio St. 263, 82 Am. Dec. 438; Gilmore v. Miami Ex. Co., 2 Ohio, 294; Platt v. St. Clair, 6 Ohio, 227.

30 French v. Willett, 10 Abb. Pr. 99.

31 Forbes v. Waller, 25 N. Y. 430; Renaud v. O'Brien, 35 N. Y. 91.

tiff from issuing execution against other defendants or making them parties.[32]

§ 2153. **Allegation of bad faith.**—In a complaint in a creditor's action seeking to set aside a conveyance as fraudulent, an allegation that the grantee, the debtor's wife, gave no consideration for the premises conveyed to her, and that the whole consideration came from her husband, is a sufficient allegation of bad faith or fraudulent intent on her part.[33] A mere general allegation that the conveyance was made to delay, hinder, and defraud is not sufficiently specific where the fraud is extrinsic to the instrument.[34]

A complaint seeking to set aside a conveyance on an allegation that it was made voluntarily and without a valuable consideration, and to hinder, delay, and defraud creditors, and particularly plaintiff, is demurrable because of the generality of the allegation of fraud, as it lacks the degree of particularity in the statement of facts and circumstances required when a fraudulent conveyance is alleged to have been made.[35] The averments must be of such facts from which, unexplained, a conclusion of fraud arises.[36] A complaint in equity which alleges that the grantors in a certain conveyance were insolvent, and were being pushed by their creditors, and that such conveyance was without consideration, and wholly voluntary, and made with intent to hinder, delay, and defraud the creditors of the grantors, sufficiently sets forth the facts constituting the fraud.[37] The Civil Code declares the question of fraudulent intent to be one of fact, and not of law, and that a transfer or change cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.[38]

§ 2154. **Attachment creditor.**—It has been frequently held that the lien acquired by the levy of an attachment will not, alone,

32 Strange v. Longley, 3 Barb. Ch. 650. See Speiglemyer v. Crawford, 6 Paige, 254.

33 Newman v. Cordell, 43 Barb. 448.

34 Kohner v. Ashenauer, 17 Cal. 580; Kinder v. Macy, 7 Cal. 206; Meeker v. Harris, 19 Cal. 278, 79 Am. Dec. 215; Harris v. Taylor, 15 Cal. 348; Castle v. Bader, 23 Cal. 77; Kent v. Snyder, 30 Cal. 674; Mott v. Dunn, 10 How. Pr. 225.

35 Kohner v. Ashenauer, 17 Cal. 578. See, also, National State Bank v. National Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Pollak v. Searcy, 84 Ala. 262, 4 South. 137; Fuller v. Brown, 76 Hun, 557, 28 N. Y. Sup. 189.

36 Williams v. Spragins, 102 Ala. 424, 15 South. 247.

37 Paulson v. Ward, 4 N. Dak. 100, 58 N. W. 792.

38 Civ. Code, § 3442.

authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment action.[39] But the plaintiff obtains such a lien upon the property attached as will entitle him to the intervention of equity to remove or set aside fraudulent obstacles to the enforcement of the lien, and for this purpose may maintain an action to reach the fund fraudulently transferred by the debtor.[40]

§ 2155. **Docketing judgment—Allegation of.**—If the judgment is one which will run into the county, docketing in another county need not be averred, unless real property of the defendant be there situated.[41] The docketing of a judgment has the effect of imparting constructive notice, even to strangers to the judgment, of the lien of the judgment on the real estate of the judgment debtor.[42] An allegation that a judgment was duly given is not necessary in case of a judgment rendered by a court of coördinate jurisdiction.[43]

§ 2156. **Enforcing trust against attorney.**—A court of equity will enforce the trust which the law raises, where an attorney has in his hands, with notice of the right of the judgment creditors, the property of his clients.[44]

§ 2157. **Fictitious grantee.**—In a bill to set aside certain conveyances of real estate as fraudulent against creditors, there is no necessary inconsistency in averring the grantee to be a fictitious person, and that the deed to him, or in his name, was made to hinder and defraud creditors.[45] It is sufficient to allege generally that the conveyance was made with the intent to delay and defraud the grantor's creditors.[46]

§ 2158. **Form of bill.**—It is immaterial whether the bill in form be a creditor's bill, if it contains upon its face matters for

39 Wilson v. Forsyth, 24 Barb. 105; Brooks v. Stone, 11 Abb. Pr. 220; Mills v. Block, 30 Barb. 552; Reubens v. Joel, 13 N. Y. 488; Mechanics & Traders' Bank v. Dakin, 28 How. Pr. 502.

40 Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324; Greenleaf v. Mumford, 19 Abb. Pr. 469, 30 How. Pr. 30.

41 Millard v. Shaw, 4 How. Pr. 137.

42 Page v. Rogers, 31 Cal. 293.

43 Williams v. Hogeboom, 8 Paige, 469.

44 Cowing v. Greene, 45 Barb. 585.

45 Purkitt v. Polack, 17 Cal. 327.

46 Durant v. Pierson, 8 N. Y. Supp. 904; Probert v. McDonald, 2 S. Dak. 495, 39 Am. St. Rep. 796, 51 N. W. 212; Paulson v. Ward, 4 N. Dak. 100, 58 N. W. 792.

relief.[47] It should be so definite in description of the estate, as that any one reading it can learn thereby what property is the subject of the litigation.[48]

§ 2159. **Limitation of action.**—If a debtor, anticipating a judgment against him, fraudulently conveys his property to another who is privy to the fraud, with intent to hinder and delay the creditor, who thereafter obtains judgment, and levies his execution on the property in the hands of the fraudulent grantee, but is afterwards induced to release the levy on the false and fraudulent representations of the grantor, and to permit his judgment to become barred by the statute of limitations, by reason of similar false representations by the judgment debtor, to the effect that he has no property and is insolvent, the creditor, on averring and proving the facts, and that he discovered the fraud but recently before the commencement of the action, is entitled to relief.[49] A creditor's bill depends upon the existence of the judgment, and where, pending such action, it becomes dormant, the action must fail.[50] Where judgment and execution thereon returned *nulla bona* is a prerequisite to a suit, limitations against the creditor's suit commence to run not from the time of the fraudulent transfer, or of discovery of the property, but from the return of the execution *nulla bona*.[51]

§ 2160. **Fraudulent judgments.** — Where several fraudulent judgments are confessed in several courts, it would not be necessary for a creditor to bring a different suit in each different court.[52] Such judgments are void against creditors.[53]

§ 2161. **Husband and wife.**—Property bought by the husband as the agent of his wife, with her money, and afterwards, in good faith, and without intent to defraud creditors, sold by him as her agent at a profit, is not subject to the claims of the creditors of the husband to the extent of the profit, on the ground that the profit was the result of his skill or ability. Profits derived from an

47 Sedam v. Williams, 4 McLean, 51, Fed. Cas. No. 12609.

48 Miller v. Sherry, 2 Wall. 237, 17 L. Ed. 827.

49 Marshall v. Buchanan, 35 Cal. 264, 95 Am. Dec. 95.

50 Miller v. Melone, 11 Okla. 241, 67 Pac. 479, 56 L. R. A. 620.

51 Williams v. Commercial Nat. Bank, 49 Or. 492, 91 Pac. 435, 90 Pac. 1012, 11 L. R. A. (N. S.) 857.

52 Uhlfelder v. Levy, 9 Cal. 607.

53 Cal. Civ. Code, § 3439.

investment of the money of the wife in her name are to be regarded as belonging to her, although they were secured by the agency of her husband in the management of the business.[54] A mere judgment creditor is not entitled to maintain a creditor's suit to reach real property appearing of record in the name of the judgment debtor's wife, subject to resulting trust in his favor. but a specific lien must be procured upon the judgment debtor's interest therein.[55]

§ 2162. **Complaint—Inceptive steps.**—In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance is not irrelevant or redundant matter.[56]

§ 2163. **Averment of insolvency of debtor.**—A complaint, by a judgment creditor who has obtained a sheriff's deed, to cancel a deed given by the debtor to defraud the creditor before judgment was recovered, need not aver that the debtor was insolvent when he made the deed. It need not be averred that the plaintiff has exhausted his remedy at law by issuing an execution and having it returned *nulla bona*, for the reason that the fraudulent deed is a cloud on the title.[57] In an action by a creditor to defeat a conveyance on the ground of fraud, where there is no allegation of insolvency, and the charges of fraud are in the most general form, the conveyance, however fraudulent as to creditors, being valid as between the parties, no one can impeach it without showing that he has been injured thereby, and that he is deprived of his remedy at law, and that the debtor has no other property which may be reached by ordinary legal remedies; that such remedies have been exhausted, or that resort to them would be fruitless. The specific facts constituting the fraud must be averred.[58] In an action by a creditor of the husband against the wife, as

54 Merchant v. Bunnell, 3 Keyes, 539.

55 Robison v. Gumaer, 43 Colo. 310, 95 Pac. 935; Raymond v. Blancgrass, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976.

56 Perkins v. Center, 35 Cal. 713.

57 Hager v. Shindler, 29 Cal. 47.

58 Harris v. Taylor, 15 Cal. 348. Insolvency—No other property.—Sufficient allegation of debtor's insolvent condition. Fitzgerald v. Neustadt, 91 Cal. 600, 27 Pac. 936; Dunsback v. Collar, 95 Mich. 611, 55 N. W. 435. See, also, Pehrson v. Hewitt, 79 Cal. 594, 21 Pac. 950; Wright v. Cohn, 88 Cal. 328, 26 Pac. 600; Hass v. Whittier, 87 Cal. 613, 25 Pac. 917.

trustee of the latter's interest in land held in her name, to compel a conveyance to the husband of his interest therein, in order that it may be subjected to the payment of his debts to the plaintiff, an allegation of the husband's insolvency is unnecessary.[59] A conveyance made with the direct purpose to defraud creditors may be attacked without charging insolvency as the result of such conveyance.[60] A party who assails a conveyance as fraudulent must aver that the grantor had no other property subject to execution at the time the execution was issued as well as at the time the conveyance was executed.[61] An allegation that after the transfer the company became insolvent, and was dissolved, is an indirect statement that it was solvent when the transfer was made. It would be untrue to say that the company became insolvent after the assignment, if it were insolvent before and at the time of the assignment.[62]

§ 2164. Joinder of causes.—A claim to set aside two several conveyances, fraudulently made by a judgment debtor to several grantees, may be brought in one action.[63]

§ 2165. Joint associations.—It is not necessary to make all persons materially interested parties to the suit. When it is impracticable or inconvenient, one may sue for all.[64] The remedy against the joint property of an association or partnership must be exhausted before action can be brought against the individual members.[65]

§ 2166. Legal remedy must be exhausted.—The remedy at law must be exhausted before a court of equity will grant relief, and

59 O'Connell v. Taney, 16 Colo. 353, 25 Am. St. Rep. 275, 27 Pac. 888.

60 Keller v. Whitledge, 38 Ill. App. 310.

61 Winstandley v. Stipp, 132 Ind. 548, 32 N. E. 302. Compare York v. Rockwood, 132 Ind. 358, 31 N. E. 1110; Wilson v. Boone, 136 Ind. 142, 35 N. E. 1096; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557. As to sufficient allegation that the defendant had no other property, see O'Leary v. Duvall, 10 Wash. 666, 39 Pac. 163; Whitehouse v. R. R. Co., 9 Wash. 558, 38 Pac. 152.

62 Nelson v. Eaton, 15 How. Pr. 305.

63 Jacot v. Boyle, 18 How. Pr. 106. See Marston v. Dresden, 76 Wis. 418, 45 N. W. 110. As to petition by creditors against an insolvent debtor under the California insolvent act, see In re Close, 106 Cal. 574, 39 Pac. 1067; Dyer v. Bradley, 89 Cal. 557, 26 Pac. 1103.

64 Gorman v. Russell, 14 Cal. 531; Von Schmidt v. Huntington, 1 Cal. 55; Kirk v. Young, 2 Abb. Pr. 453; see § 2150 supra.

65 Robbins v. Wells, 26 How. Pr. 15.

the creditor must have acquired an equitable lien.[66] In a proper case, a creditor's bill can be maintained, where the action is commenced after a return in good faith of *nulla bona*, though it be made within the sixty days allowed by law as the possible life of an execution.[67] A fraudulent conveyance may be set aside by a creditor's suit without first going through the form of a levy and sale under execution.[68] But a judgment creditor may resort to chancery to subject the effects of his debtor, beyond the reach of execution at law, before he takes out execution on his judgment, if it appears that the debtor has not effects liable to execution to satisfy the judgment, or the effects are connected with equities or trusts, or involve a variety of interests, so that an adequate remedy cannot be had at law.[69]

Before equity can be invoked in a creditor's bill it must be shown that the remedies at law are unavailing, and the bill must aver that an execution has been returned unsatisfied. Such is the general rule.[70] And a complaint showing on its face that part of the indebtedness upon which the complaint is based has not been reduced to judgment, is fatally defective.[71] In an action by a purchaser of land at sheriff's sale to cancel a former deed on the ground that the deed is fraudulent and void as to creditors, the complaint need not allege the issuance of execution in the original suit and a return *nulla bona*, nor that the plaintiff is in possession of the land.[72] A creditor's bill to collect unpaid stock subscriptions, alleging a judgment against an insolvent corporation, the issue of execution, and a return thereon of *nulla bona*, need not allege that the judgment is unpaid.[73]

§ 2167. Lien.—An attaching creditor acquires a lien on any interest the debtor may have in land standing in another's name,

66 Dunlevy v. Tallmadge, 32 N. Y. 457.

67 Renaud v. O'Brien, 35 N. Y. 99.

68 Jenner v. Murphy, 6 Cal. App. 434, 92 Pac. 405.

69 Piatt v. St. Clair Heirs, 6 Ohio 227. As to necessity of averring that execution was issued, and a return of no property, see Bomberger v. Turner, 13 Ohio St. 263; 82 Am. Dec. 438.

70 Herrlich v. Kaufmann, 99 Cal. 271, 37 Am. St. Rep. 50, 33 Pac. 857; National Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548.

71 Hood v. Saunders, 11 Colo. 106, 17 Pac. 102. Exceptions to the general rule, see Hodges v. Mining Co., 9 Or. 200; Blanc v. Paymaster Min. Co., 95 Cal. 524, 29 Am. St. Rep. 149, 30 Pac. 765; Miller v. Hughes, 33 S. C. 530, 12 S. E. 419.

72 Mulock v. Wilson, 19 Colo. 296, 35 Pac. 532.

73 Henderson v. Turngren, 9 Utah, 432, 35 Pac. 495. Compare Tatum v.

which lien he may enforce after judgment, on a creditor's bill, and the petition need not aver execution issued and returned *nulla bona*.[74] Where a judgment creditor obtains judgment against his debtor and the assignee, declaring the assignment void and appointing a receiver, he has an equitable lien upon the assets which dates from the commencement of the action.[75] It seems that the lien acquired by the commencement of a creditor's suit, to reach equitable interests and things in action, should not be regarded as attaching by the mere commencement of the suit, but only when judgment is obtained. If it be otherwise, a creditor claiming such a lien, under proceedings commenced before the enactment of the national bankrupt law, must disclose such proceedings and lien, on proving his claim in a court of bankruptcy; and if he do not, he waives thereby the lien.[76] Insolvency of a general and ordinary partnership gives the partnership creditors no lien, nor is the property converted into a trust fund for their benefit.[77] A judgment creditor, having no title or specific lien, may maintain an action to obtain the cancellation of prior judgments which are apparent liens upon the lands of the debtor, but which he alleges to have been paid, and this without alleging collusion to keep judgments on foot to defraud creditors.[78] The funds recovered by a creditor's bill will be distributed by order of court in a case involving the relative priority of holders of judgments recovered before and after the commencement of the suit, and creditors at large.[79]

§ 2168. **Mortgage.**—Where a creditor's bill, filed to compel the application of choses in action, equitable interest, etc., to the payment of a judgment against A., it is charged that A. has made a fraudulent conveyance of land to B., who is also a party, and it is claimed that the deed should be set aside, and it appears that the conveyance was made in good faith, but that B. gave to A. a mortgage thereon which is unpaid, it is competent for the court to

Rosenthal, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136, holding that the complaint in such action need not allege that the proceeding is for the benefit of all the creditors. See, also, Harmon v. Page, 62 Cal. 448.

74 Ziska v. Ziska, 20 Okla. 634, 95 Pac. 254.

75 Field v. Sands, 8 Bosw. 685. See Green v. Griswold, 4 N. Y. Supp. 8; Fordyce v. Hicks, 76 Iowa, 41, 40 N. W. 79.

76 Stewart v. Isidor, 5 Abb. Pr. (N. S.) 68.

77 Dunlevy v. Tallmadge, 32 N. Y. 457.

78 Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275.

79 Wallace's Admr. v. Treakle, 27 Gratt. 479.

decree that B. pay such mortgage to the receiver to be applied on the judgment, although such mortgage was not named in the bill or in the prayer for relief. The objection that a third person should have been made a party as assignee, and that B. may hereafter be called upon to pay the mortgage to him, is waived by B., if he does not make it by answer or demurrer. In such case, although it appeared that a third person, not a party to the suit, claimed to own the mortgage, and the evidence tended to show an assignment by A. to him, still it being proved and found that such assignment was fraudulent, it was proper to require B. to pay the mortgage to the receiver.[80] In a creditor's bill to subject the interest of a mortgagor in land, it is not necessary to tender the money due to the mortgagee. In such proceeding the mortgagor's interest may be sold.[81]

§ 2169. **Non-resident debtor.**—It is sufficient for the plaintiff to show that all remedies at law were exhausted against the debtor in the state in which he resided, and that in this state no legal remedy was available.[82]

§ 2170. **Obstructions to execution.**—Such an action lies to set aside fraudulent obstructions which lie in the way of a satisfaction of the judgment. Or where the execution will not avail to cancel the judgment, he may bring an action in aid of his execution to reach property upon which a levy cannot be made.[83]

§ 2171. **Partnership debtor.**—A creditor of a partnership cannot have an assignment for the benefit of creditors set aside merely because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. The one hindered, delayed, or defrauded can alone bring the action.[84] The judgment creditor of a limited partnership is entitled to bring an action to set aside any void assignment which hinders the enforcement of the judgment and execution

80 Durand v. Hankerson, 39 N. Y. 287.

81 Mattocks v. Humphrey's Admr., 17 Ohio, 336.

82 McCartney v. Bostwick, 32 N. Y. 53.

83 See Hadden v. Spader, 20 Johns. 554. Upon personal or real property, see Congdon v. Lee, 3 Edw. 304. As to creditor's bill in aid of execution, see Stock Growers' Bank v. Newton, 13 Colo. 245, 22 Pac. 444; Buswell v. Lincks, 8 Daly, 518; Zoll v. Soper, 75 Mo. 460; Allen v. Smith, 129 U. S. 465, 32 L. Ed. 732, 9 Sup. Ct. 338.

84 Morrison v. Atwell, 9 Bosw. 503.

against the joint and separate property of any members of the partnership.[85] It seems that creditors of a firm cannot reach the property of a deceased partner in the hands of his surviving partner, without having some one before the court entitled to represent the estate of the deceased.[86] A judgment creditor need not have possession of land, to enable him to maintain a suit in equity after he has a sheriff's deed, to cancel a deed of the same given by the debtor to defraud him before he recovered judgment.[87]

§ 2172. **Practice in California.**—The proceedings supplementary to execution are special proceedings regulated by statute, and when the execution is returned unsatisfied the judgment debtor may be made to appear within the county where he resides or has a place of business.[88] They are a substitute for a creditor's bill in the old practice.[89]

§ 2173. **The same—Examination of debtor.**—When the plaintiff proceeded, under section 239 of the Practice Act,[90] to examine his judgment debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of the plaintiff, it seems that it was not necessary to make A. a party to the proceeding.[91]

§ 2174. **The same—Refusal to obey order.**—A commitment for contempt, for refusing to obey an order of the court, commanding the imprisonment of the party in contempt, until he shall comply with the order, should set forth that it is in the power of the party to comply.[92]

§ 2175. **The same—Payment to sheriff.**—After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution.[93] In order to bring a party within the

85 Fanshawe v. Lane, 16 Abb. Pr. 71.

86 Loeschigk v. Hatfield, 5 Robt. 26.

87 Hager v. Shindler, 29 Cal. 47.

88 Cal. Code Civ. Proc., § 714.

89 Adams v. Hackett, 7 Cal. 187; Byrd v. Badger, 1 McAll. 443, Fed. Cas. No. 2266.

90 Cal. Code Civ. Proc., § 715. See Lewis v. Chamberlain, 108 Cal. 525, 41 Pac. 413; High v. Bank of Commerce, 103 Cal. 525, 37 Pac. 508.

91 Adams v. Hackett, 7 Cal. 187.

92 Ex parte Cohen, 6 Cal. 318.

93 Cal. Code Civ. Proc., § 716.

terms of this section, there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs.[94] Where the plaintiff, in an action for personal tort, after a verdict in his favor and before judgment, assigned the cause of action and verdict, the assignment was void, and the payment by defendant to the sheriff was a satisfaction of the judgment.[95]

§ 2176. **The same—Order to appear.**—The judge may order debtors of the judgment debtor to appear and be examined as to the property of the judgment debtor in their hands,[96] and may order the property applied on execution; but no such order can be made as to money or property in the hands of any other person or claimed to be due from him to the judgment debtor, if such person claims an interest in the property adverse to the judgment debtor or denies the debt.[97] And in case of such a claim the judgment creditor may begin a creditor's suit against such claimant, and may have such claimant restrained from transferring the property, until after suit is commenced and prosecuted to judgment.[98]

§ 2177. **Priority.**—The complainants who first filed the bill have no preference thereby over the other creditors; all may have a *pro rata* distribution.[99] So with one of numerous bondholders of a corporation who are secured by a mortgage to trustees, the other bondholders are entitled to come in for their proportion of the mortgaged premises.[100]

§ 2178. **Property in possession.**—To sustain an order that the defendant apply property in his possession to the judgment, it is not enough that he has it in his possession. It must appear to be his property. If the contrary appears, the remedy to test the title is for the receiver to bring action for the property.[101]

94 Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655.

95 Lawrence v. Martin, 22 Cal. 173.

96 Cal. Code Civ. Proc., § 717.

97 Cal. Code Civ. Proc., § 719. See Hathaway v. Brady, 26 Cal. 586.

98 Cal. Code Civ. Proc., § 720, as amended 1907.

99 Day v. Washburn, 24 How. 352, 16 L. Ed. 712.

100 Martin v. Somerville Water Power Co., 27 How. Pr. 161; Pennock v. Coe, 23 How. 117, 16 L. Ed. 436.

101 Rodman v. Henry, 17 N. Y. 482.

§ 2179. **Relief.**—The relief to be granted will be only what on the whole appears due to plaintiff.[102] Under the settled practice of courts of equity, the court may, on a creditor's bill, adjust equities and priorities of the different classes of creditors, as represented by the parties then before the court.[103] For the relief granted in some cases turning upon the special circumstances shown, see the cases cited in the note.[104]

§ 2180. **Relation of surety.**—It is held enough, after stating facts to show the relation of suretyship, to aver that the creditor's suit was prosecuted for the benefit of the surety.[105] If a surety has a counterbond or security from the principal debtor, the creditor will be entitled to the benefit of it, and may in equity subject such security to the satisfaction of the debt, so far as it can be done without trenching upon the rights of the surety himself.[106]

§ 2181. **Return of execution.**—It is immaterial that the return is made at the request of the plaintiff.[107]

§ 2182. **Sale of property.**—Every sale of property and personal chattels is good between the parties, and cannot be attacked, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned, unsatisfied, in whole or in part,—with the single statutory exception of an attaching creditor; and his remedy being unknown to the common law, he must show affirmatively that his attachment has been properly issued under the statute, before he can attack the sale. For such a purpose the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ.[108]

§ 2183. **Deposit of trust.**—When a party has in his possession or under his control any money or other thing capable of delivery,

102 Bean v. Smith, 2 Mason, 252, Fed. Cas. No. 1174. See Burton v. Smith, 13 Pet. 464, 10 L. Ed. 248.

103 Morton v. New Orleans etc. Ry. Co., 79 Ala. 590.

104 Hagan v. Walker, 14 How. 29, 14 L. Ed. 312; Green v. Creighton, 23 How. 90, 16 L. Ed. 419; Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. Ed. 349; Adler v. Fenton, 24 How. 407, 16 L. Ed. 696; Collinson v. Jackson, 8 Saw. 357, 14 Fed. 305; Strayer v. Long, 83 Va. 715, 3 S. E. 372.

105 Child v. Brace, 4 Paige, 309.

106 Van Orden's Admr. v. Durham, 35 Cal. 136.

107 Forbes v. Waller, 25 N. Y. 430.

108 Thornburg v. Hand, 7 Cal. 554.

which being the subject of the litigation is held by him as trustee for another party, the court may order the same to be deposited in the court or delivered to such party, on such conditions as may be just, subject to the further direction of the court.[109]

§ 2184. **Voluntary conveyance.**—A voluntary conveyance of his property to his wife, by one about to engage in a business which he believes may subject him to losses, in order to secure such property for himself and family in the event of such losses, is fraudulent.[110] A voluntary conveyance made in performance of previous equitable duty to convey, in pursuance of an oral agreement fully performed by the grantee, cannot be impeached by an immediate creditor subsequently recovering judgment.[111] A conveyance without consideration, made to defraud the creditors of the grantors, and recorded, is valid against a subsequent purchaser for a valuable consideration.[112]

§ 2185. **When action lies.**—Upon the question how far a creditor must have proceeded by judgment and execution in various cases before he can maintain a creditor's suit in equity, see the cases cited below.[113] The right of this action is confined, however, to the judgment creditor,[114] for his own benefit, or he may unite with other creditors standing in the same relation with himself, and whose judgments have been returned unsatisfied.[115] Mere creditors at large cannot file a bill to reach the assets of their debtors.[116] A creditor whose debtor is imprisoned in the state prison for a term less than his natural life may sue and subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment.[117]

109 Cal. Code Civ. Proc., § 572.

110 Case v. Phelps, 39 N. Y. 164.

111 Dygert v. Remerschnider, 32 N. Y. 629.

112 Stevens v. Morse, 47 N. H. 532.

113 Hagan v. Walker, 14 How. 29, 14 L. Ed. 312; Green v. Creighton, 23 How. 90, 16 L. Ed. 419; Adler v. Fenton, 24 How. 407, 16 L. Ed. 696; Jones v. Green, 1 Wall. 330, 17 L. Ed. 553; United States v. Sturges, 1 Paine, 525; Fed. Cas. No. 16414; McCalmount v. Lawrence, 1 Blatchf. 332, 5 N. Y. Leg. Obs. 205, Fed. Cas. No. 8676; Howe v. Cobb, 3 McLean, 270, Fed. Cas. No. 6767. That this remedy may still be pursued, see Hammond v. Hudson River Iron etc. Co., 20 Barb. 378; Catlin v. Doughty, 12 How. Pr. 457.

114 Reubens v. Joel, 13 N. Y. 488.

115 Wakeman v. Grover, 4 Paige, 23; Lentilhon v. Moffat, 1 Edw. Ch. 451.

116 Reubens v. Joel, 13 N. Y. 488.

117 Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111.

§ 2186. What may be reached.—In Tennessee, a creditor who has sold his debtor's land by execution, and become the purchaser, may, by bill, under the code,[117a] subject to the satisfaction of the residue of his judgment the equitable interest of the debtor in the land by virtue of his right to redeem. The question was reserved whether the lien of the plaintiff, acquired by filing his bill, affects the right of other judgment creditors to redeem.[118] Generally speaking, every species of the debtor's property may be reached on a creditor's bill.[119] But property exempt from execution cannot be thus reached.[120] But the complaint need not allege that the property was subject to execution; and if not subject to execution, that fact may be pleaded as matter of defense.[121]

A creditor's bill may charge both the debtor and his surety, or an administratrix of the latter, to have combined with the debtor in committing a fraud;[122] or it may be filed against the supervisors of a county.[123] In a bill to set aside a conveyance as made without consideration, and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant in the bill.[124]

§ 2187. Who may assign.—One partner of a firm, expressly or by implication sole manager, his partners being absent, may assign firm property in trust for benefit of creditors.[125] A gift by a husband to a wife, made when he is free from debt, cannot be impeached on the ground of debts subsequently contracted.[126] But when a debtor's wife gives no consideration for the premises conveyed to her, and the whole consideration comes from her husband, it shows bad faith or a fraudulent intent on her part.[127]

§ 2188. Who may sue.—A creditor having obtained judgment against a debtor may bring suit in aid of execution.[128] A

117a §§ 4282 et seq.

118 Weakley v. Cockrill, 2 Tenn. Ch. 316.

119 Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593, 15 N. E. 817; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am. Rep. 120.

120 Tracey v. Cover, 28 Ohio St. 61; Smillie v. Quinn, 90 N. Y. 492.

121 Slagle v. Hoover, 137 Ind. 314, 36 N. E. 1099.

122 McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. Ed. 675.

123 Lyell v. St. Clair Co., 3 McLean, 580, Fed. Cas. No. 8621.

124 Gaylords v. Kelshaw, 1 Wall. 81, 17 L. Ed. 612.

125 Forbes v. Scannell, 13 Cal. 242.

126 Phillips v. Wooster, 3 Abb. Pr. (N. S.) 475.

127 Newman v. Cordell, 43 Barb. 448.

128 Hendricks v. Robinson, 2 Johns. Ch. 283. See, also, as to who may sue, § 2150, ante; Sullivan v. Miller, 106

creditor cannot avoid an assignment merely on the ground that it contains a provision which is illegal, if such provision tends to his benefit; he must show himself injured thereby.[129] Mere creditors at large cannot file a bill to reach the assets of their debtor, and no distinction exists between simple contract creditors of an individual and those of a corporation.[130] And even a general creditor's bill is not maintainable by a creditor at large.[131] A sheriff cannot institute a creditor's suit to reach the proceeds of the assigned property, that it may be applied on an execution in his hands.[132] Creditors of an indebted corporation are entitled to the aid of a court of equity against such corporation and its debtors.[133] A surety against whom a judgment is rendered may maintain this action without first paying the debt.[134]

§ 2189. Docketing of judgment.—The docketing of justices' judgments must be averred, and an execution against real as well as personal property issued and returned unsatisfied.[135] The filing of a transcript of a judgment docket of a district court with the recorder of any other county makes it a lien upon the real estate in that county, but it does not make it a judgment of the district court of that county.[136] It is the duty of the county clerk, as such, and not the clerk of the district court, as such, to issue execution. District courts have no power to issue writs of assistance in cases of sales upon judgments rendered by justices of the peace or other district courts. The judgment becomes a lien upon the debtor's real property in the county where filed for two years from the date of the filing, notwithstanding a lien by virtue of the same judgment has previously existed and expired by lapse of time in another county.[137]

N. Y. 635, 13 N. E. 772; Forde v. Exempt Fire Co., 50 Cal. 299; Frothingham v. Hodenpyl, 16 N. Y. Supp. 341.

129 Fox v. Heath, 16 Abb. Pr. 163.

130 Miller v. Earle, 24 N. Y. 110; Dunlevy v. Tallmadge, 32 N. Y. 457; Coope v. Bowles, 42 Barb. 87; Field v. Hunt, 24 How. Pr. 463; Hunt v. Chapman, 15 Abb. Pr. 434.

131 Dunlevy v. Tallmadge, 32 N. Y. 457; reversing Fassett v. Tallmadge, 18 Abb. Pr. 48.

132 Lawrence v. Bank of the Republic, 35 N. Y. 320; reversing 3 Robertson, 142.

133 Ogilvie v. Knox Ins. Co., 2 Black, 539, 17 L. Ed. 349.

134 Stump v. Rogers, 1 Ohio, 533; Horsey v. Heath, 5 Ohio, 353; McConnell v. Scott, 15 Ohio, 401, 45 Am. Dec. 583; Hale v. Wetmore, 4 Ohio St. 600; Brannan v. Smith, 2 Disney, (Ohio) 436.

135 Crippen v. Hudson, 13 N. Y. 161.

136 People v. Doe, 31 Cal. 220.

137 Donner v. Palmer, 23 Cal. 40, See Cal. Code Civ. Proc., §§ 897-900.

§ 2190. **Action to enforce trust.**—An action by a creditor to enforce the trust which is raised by the statute in favor of the creditor of a person paying the consideration of a purchase of land conveyed to a third person, is not an arbitrary creditor's suit within the rule that the legal remedy must first be exhausted.[138] A court of equity will enforce a trust against all persons who with notice of the trust came into the possession of the trust property, in the same manner and with the like effect as against the original trustee.[139]

§ 2191. **Partner as trustee.**—If two partners are embarrassed with debts, and one executes a deed to the other absolute on its face, with a consideration expressed, of both his individual and partnership property, for the purpose of raising money, by mortgaging the same, to pay the debts of the firm, there is no express trust, nor does a trust arise by implication of law.[140]

§ 2192. **Property held in trust.**—Property held in trust for a debtor, and for his benefit, or arising out of a fund proceeding from a third person in trust, to secure to the debtor personally a support, cannot be reached or taken by a judgment creditor, by means of proceedings supplementary to execution.[141] The provisions of section 297 of the New York code were never intended to be applicable except to a case where it is clearly established or is admitted that the party upon whom the order is to be made has in his hands property of the judgment debtor, or is indebted to him. If these facts are not established, the proper course is to appoint a receiver, with leave to sue in equity, to ascertain if there be any surplus by an accounting.[142] A trustee cannot by mingling moneys with other funds, change his character from that of trustee to that of mere debtor.[143] The fact that the property sought is a trust fund interposes no obstacle in subjecting it to the satisfaction of the judgment, when the fund was created by the debtor himself, and the fund sought to be reached has risen from the sale of his own property.[144]

138 McCartney v. Bostwick, 32 N. Y. 53. See National etc. Bank v. Wetmore, 124 N. Y. 241, 26 N. E. 548.

139 Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141.

140 Burt v. Wilson, 28 Cal. 632, 87 Am. Dec. 142.

141 Locke v. Mabbett, 2 Keyes, 457; Porter v. Lee, 88 Tenn. 782, 14 S. W. 218.

142 Locke v. Mabbett, 2 Keyes, 457.

143 Gunter v. Janes, 9 Cal. 643.

144 Hexter v. Clifford, 5 Colo. 168; Jackson v. Vonzedlitz, 136 Mass. 342.

§ 2193. Stale trust.—Courts of equity, acting on their own inherent doctrines of discouraging, for the peace of society, antiquated demands, refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, and the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*.[145] A valid declaration of trust as to lands held for the use of another may be made at any time, and does not necessarily have to be made at the time of the creation of the trust.[146]

§ 2194. Equitable assets.—To maintain a creditor's bill in chancery, in order to reach equitable assets which are alleged to have been fraudulently conveyed it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set forth which will reasonably sustain the theory of the bill.[147] A non-negotiable chose in action cannot be impeached in the hands of an innocent assignee by the creditors of those making such chose in action.[148] In a bill against a fraudulent grantee of a deceased person it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative.[149]

§ 2195. Essential allegations.—It is not necessary to aver a debt due in the ancestor's lifetime.[150] The premises should be described with reasonable certainty.[151] And if the plaintiff is unable to ascertain the description of the lands which have been inherited, the fact should be stated.[152] In suing the heirs and devisees jointly, it must be averred that the real estate descended is insufficient.[153] It must be shown that the personal assets of the deceased were insufficient to discharge the debt, before the real property can be reached.[154] But where the defendant is not sued as heir, but on a special promise, no averment of assets

145 Badger v. Badger, 2 Wall. 87, 17 L. Ed. 836.
146 Sime v. Howard, 4 Nev. 473.
147 Kinder v. Macy, 7 Cal. 207.
148 Wright v. Levy, 12 Cal. 257.
149 McLaughlin v. Bank of Potomac, 7 How. 220, 12 L. Ed. 675.
150 Parsons v. Parsons, 5 Cow. 476.
151 Sharp v. Sharp, 3 Wend. 278.
152 Parsons v. Bowne, 7 Paige, 354.
153 Schermerhorn v. Barhydt, 9 Paige, 28. To similar effect, see Wambaugh v. Gates, 1 How. App. Cas. 247; affirming 11 Paige, 505.
154 Roe v. Swezey, 10 Barb. 247; Mersereau v. Byerss, 3 N. Y. 261.

is necessary.[155] The special facts on which the plaintiff's right to recover depends should be alleged.[156]

§ 2196. **Joinder of parties.**—The heirs and personal representatives cannot be joined.[157] The defendant cannot, in one count, be charged both as heir and as next of kin.[158] A creditor's bill to compel the application of real and personal property which an executrix in her own individual name conveyed to a trustee, to the payment of a judgment recovered against her as executrix is fatally defective, where there is no averment that any portion of such property formerly belonged to the testator's estate, or was derived directly or indirectly from it, or from the proceeds of it.[159]

§ 2197. **Defense—Denial of assignment.**—An allegation in the complaint that the assignment was made with the intent to hinder, delay, and defraud creditors is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors.[160]

§ 2198. **Defense by motion.**—A complaint in an action to set aside a judgment, which contains no averment showing that relief could not have been obtained on motion, may be demurrable, but if defendant fails to demur, and answers on the merits, and the facts supplying the defect appear in the record, the objection is waived.[161]

§ 2199. **Defense—Conditional sale.**—Where, on sale of personal property, the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet, by express agreement, the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and, until performance, the right of property is not vested in the purchaser.[162] A second vendee is not entitled to stand in any better situation than his

155 Elting v. Vanderling, 4 Johns. 237.

156 Gere v. Clarke, 6 Hill, 350. See Mersereau v. Ryerss, 3 N. Y. 261.

157 Stuart v. Kissam, 11 Barb. 271.

158 Gere v. Clarke, 6 Hill, 350.

159 Ferguson v. Yard, 164 Pa. St. 586, 30 Atl. 517.

160 Read v. Worthington, 9 Bosw. 617; Churchill v. Bennett, 8 How. Pr. 309.

161 Bibend v. Kreutz, 20 Cal. 109.

162 Putnam v. Lamphier, 36 Cal. 151.

vendor, in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general naming of currency. Whether a further exception to the rule exists in favor of *bona fide* purchases from the purchaser at a conditional sale is not decided.[163]

§ 2200. **Defense—Denial of notice.**—The strict rule applied in chancery required that a party claiming as a *bona fide* purchaser, without notice, must deny notice positively, and not evasively, though it were not charged in the bill and every fact from which notice might be inferred.[164] A plea of *bona fide* purchaser, for value and without notice, must be as full under the code as under the former system of equity pleading. The party setting up the plea has the burden of proof on that issue.[165] Thus where a party desires in his plea or answer to claim that he was a *bona fide* purchaser for a valuable consideration, he should state the deed of purchase, with the date, parties, and contents, briefly; that the vendor was seised in fee, and in possession; the consideration, with the distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed; and how the grantor acquired title. Notice should be denied previous to and down to the time of paying the money and the delivery of the deed.[166] In a plea of purchase for a valuable consideration, without notice of the plaintiff's title, it is necessary to aver that the person who conveyed was seised, or pretended to be seised, at the time when he executed the purchase deeds.[167] A plea denying notice "of the facts and circumstances charged" was evasive and insufficient, but was cured by a subsequent averment that the defendant was without notice "of the matters alleged, or any of them."[168] The defendant must aver and prove, not only that he had no notice before his purchase, but that he had actually paid the purchase money before such notice.[169] And it was also

163 Putnam v. Lamphier, 36 Cal. 151. See Johnson v. Kirby, 65 Cal. 482, 486, 4 Pac. 458.

164 Frost v. Beekman, 1 Johns. Ch. 288; Denning v. Smith, 3 Johns. Ch. 332; Gallatian v. Cunningham, 8 Cow. 361; Wyckoff v. Sniffen, 2 Edw. 581. As to denial of notice to agent, see Griffith v. Griffith, 9 Paige, 315, Hoff. Ch. 153.

165 Weber v. Rothchild, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

166 Boone v. Chiles, 10 Pet. 193, 9 L. Ed. 388.

167 Story v. Ld. Windsor, 2 Atk. 630; Flagg v. Mann, 2 Sumn. 486, 557; Fed. Cas. No. 4847. See Weber v. Rothchild, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650.

168 Tompkins v. Anthon, 4 Sandf. Ch. 97.

169 Jewett v. Palmer, 7 Johns. Ch. 65, 11 Am. Dec. 401.

essential to state to whom the consideration was paid on the purchase.[170] And it should be averred that the defendant's grantor was in the actual possession, or at least that the one under whom his grantor claimed was so.[171]

FORMS FOR CREDITORS' SUITS.

§ 2201. Commencement of complaint—One suing for all.

Form No. 571.

[TITLE.]

The plaintiff complains, on behalf of himself and of all others, the creditors of A. B., who shall in due time come in, and seek relief by and contribute to the expenses of this action, and alleges:

I. That the said creditors of A. B. are very numerous, to-wit, more than . . . in number, and that some of them are unknown to the plaintiff, and cannot with diligence be ascertained by him; and that it is impracticable to bring them all before the court in this action; wherefore he sues for the benefit of all.

§ 2202. The same—Where a particular class of creditors only are concerned.

Form No. 572.

[TITLE.]

The plaintiff complains, on behalf of himself and all others, the creditors of A. B., who are parties to the deed of trust hereinafter mentioned [or whose executions have been returned unsatisfied], and who shall come in and seek relief by and contribute to the expenses of this action, and alleges:

I. [The same as in preceding form, omitting "wherefore he sues for the benefit of all."]

II. That the question which is the subject of this action is one of a common and general interest of all the said creditors under the said trust deed; wherefore the plaintiff sues for the benefit of all.

III. [Allege cause of action.]

[DEMAND OF JUDGMENT.]

170 Tompkins v. Ward, 4 Sandf. Ch. 594.

171 Tompkins v. Anthon, 4 Sandf. Ch. 97.

§ 2203. Complaint by assignee in bankruptcy to recover unlawful preference or its value.

Form No. 573.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore, and on the . . . day of . . ., 19.., one L. M., of . . ., duly filed his petition in the United States district court for the . . . district of . . ., praying that he be adjudged a bankrupt pursuant to act of Congress, and that pursuant to such petition said L. M. was by said court on said day duly adjudged a bankrupt; that thereafter, and on the . . . day of . . ., 19.., this plaintiff was duly elected and appointed by the creditors of said L. M. as trustee in said bankruptcy proceedings, and such election was duly approved by I. K., referee in bankruptcy, before whom said proceedings were pending; that thereupon the plaintiff duly qualified as such trustee by giving the bond required by said court and taking the oath required by law, and entered upon his duties as trustee, and brings this action in such capacity.

II. [Set forth the property owned by the bankrupt during the four months preceding the filing of the petition, the indebtedness of the bankrupt to the defendant, and the transfer within the four months of certain of the property, describing it, to the defendant for the purpose of giving him a preference, and the knowledge of the defendant of such purpose.]

Wherefore, etc. [The demand for judgment should be for the return of the property or its value.]

§ 2204. To set aside an assignment which is void on its face.

Form No. 574.

[TITLE.]

The plaintiff complains, and alleges:

I, II, and III. [Allege judgment, and issue and return of execution, and amount due.]

IV. [Allege making of assignment, setting it forth or annexing it.] And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face, for the reason that [here set forth specifically the ground of invalidity,] and he alleges that it was made and executed by the said defendant [assignor] and accepted by the defendants [assignees] with the intent to hinder, delay, and defraud the creditors of said [assignor].

[DEMAND OF JUDGMENT.]

§ 2205. By attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate.

Form No. 575.

[TITLE.]

The plaintiff complains, and alleges:

I. That the said plaintiff has a valid claim against one L. M. in the sum of . . . dollars, and that an action is now pending in the . . . court for . . . county, in said state, in which the plaintiff herein is the plaintiff and the said L. M. is defendant, for the recovery of the said claim, and that the summons in said action has been served on the said L. M., and that the complaint therein is now on file in this court.

II. That a writ of attachment was duly issued out of this court on the . . . day of . . . , 19. . , in said action, in favor of this plaintiff and against said L. M., and that by virtue of said writ the sheriff of said . . . county, on the . . . day of . . . , 19. . , levied upon certain lands in said county described as follows: [description]; and that this plaintiff has and owns, by virtue of said writ of attachment and levy thereunder, a lien upon said land.

III. That the said L. M. has no other land or property within this state, as the plaintiff is informed and believes, out of which the plaintiff can realize his said claim.

IV. That, as the plaintiff is informed and believes, the said L. M., on the . . . day of . . . , 19. . , and after the claim of the plaintiff hereinbefore mentioned had accrued, conveyed by [warranty] deed to the defendant C. D. the said land hereinbefore described, which deed was recorded in the office of the recorder of deeds of . . . county, on the . . . day of . . . , 19. . .

V. That, as the plaintiff is informed and believes, the said conveyance was executed by the said L. M. without consideration, and with intent to hinder, delay, and defraud the creditors of the said L. M., including this plaintiff, and that the said defendant C. D. accepted and received said deed with knowledge of the said fraudulent intent on the part of the said L. M., and with intent upon his part to assist the said L. M. in his said fraudulent purpose, and to hold said lands as a secret trust for said L. M.

VI. That there is now actually and equitably due the plaintiff upon his said demand the sum of . . . dollars, with interest from . . . , 19. . .

Wherefore, the plaintiff demands judgment, that the said deed may be set aside and adjudged fraudulent and void, and that the

land therein described be adjudged subject to the lien of the plaintiff's writ of attachment aforesaid; and that the plaintiff have such other and further relief in the premises as shall be just and equitable, with costs.

§ 2206. Creditor's action on a judgment of a court of record, to set aside fraudulent assignment.

Form No. 576.

[TITLE.]

The plaintiff complains, and alleges [or commencement as in form No. 572]:

I. That on the . . . day of . . ., 19.., at . . ., judgment was rendered in the . . . court in his favor, against the defendants C. D. and E. F. for . . . dollars.

II. That on the . . . day of . . ., 19.., an execution was issued upon the said judgment, against the property of the said C. D. and E. F., addressed to the sheriff of the county of . . ., in which they then resided.

III. That the said execution has been returned by the said sheriff, wholly unsatisfied.

IV. That after the contracting of the debt on which the aforesaid judgment was recovered. the said C. D. and E. F. assigned all their property to one G. H., in trust for the payment of their debts [or, made an assignment, of which a copy is hereto annexed].

V. That the said G. H. accepted the said trust, and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over . . . dollars.

VI. That the said assignment was made with intent to delay and defraud the creditors of the said C. D. and E. F.; that ever since the said assignment was executed and delivered, the said property has remained, and still remains in the possession and under the control of the said C. D. and E. F., who falsely pretend that they are agents of said assignee.

VII. That the pretended indebtedness named and set forth in said assignment as due from said C. D. and E. F. to the defendant G. H., is fictitious; that C. D. and E. F. were not indebted to said G. H. in the sum therein named, or in any sum whatever, but the same was therein inserted for the purpose of consuming the proceeds of said goods, or of some part thereof, to the injury of plaintiff.

VIII. That the defendants C. D. and E. F. have not, nor have either of them, any property other than that assigned as aforesaid, out of which plaintiff's said execution could be satisfied in whole or in part, and that unless said property can be applied to the payment of said judgment the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That the said assignment is fraudulent and void as against the plaintiff.

2. That the said G. H. account, under the direction of the court, for all the property received by him as aforesaid.

3. That the defendants be restrained by injunction from interfering with the said property or its proceeds, except under the direction of the court.

4. That plaintiff's judgment be satisfied out of the same.

§ 2207. Allegation where debtor in the judgment is not defendant because of insolvency and absence.

Form No. 577.

That said [judgment debtor] is wholly insolvent and destitute of property [or, is not, and has not been for the space of . . . , within this state, but resides at San Salvador, in the state of Honduras, and has no property within this state].

§ 2208. Allegation where debtor in the judgment is not defendant because merely a surety.

Form No. 578.

That the said judgment was recovered in an action [describe it], brought to foreclose a mortgage made by the defendant to said [surety], with a note collateral thereto, and that said note and mortgage were assigned to the plaintiff by the said [surety], who thereupon guaranteed the payment thereof; but the same not being paid, and the mortgaged premises being sold upon foreclosure in said action for less than the sum due, said judgment was recovered for the deficiency, as to which the said [surety] was merely a surety, and not liable as a principal debtor, and which it was, by a provision in said judgment, directed should be levied on the property of the defendant (principal debtor),

if it could be so collected; and if it could not, then to be levied on the property of said [surety].

§ 2209. Upon a justice's judgment.

Form No. 579.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . ., 19.., at . . ., before J. P., a justice of the peace in and for the town of . . ., county of . . ., in this state, the plaintiff recovered a judgment, which was duly given by said justice against the defendant, for . . . dollars damages and . . . dollars costs in an action wherein this plaintiff was plaintiff, and the defendant herein was defendant.

II. That on the . . . day of . . ., 19.., a transcript of the same was filed and docketed in the office of the clerk of the county of . . ., in this state [in which county the defendant then resided].

III. That on the . . . day of . . ., 19.., an execution was duly issued upon the said judgment against the property of the defendant, and addressed to the sheriff of said . . . county.

[Continue as in last form.]

[DEMAND OF JUDGMENT.]

§ 2210. Allegation where debtor's residence is unknown.

Form No. 580.

That on the . . . day of . . ., 19.., an execution was issued upon the said judgment, against the personal and real property of the defendant, to the sheriff of said . . . county, in which county was the defendant's last known residence within this state, his residence at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor.

§ 2211. Against debtor, to reach demands due him from third parties.

Form No. 581.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege rendition of judgment.]

II. That on the . . . day of . . ., 19.., said judgment was docketed in the office of the clerk of said county, and on the . . .

day of . . . , 19.., a transcript thereof was filed, and the said judgment was docketed in the clerk's office of the county of . . . , in this state.

III. That on the . . . day of . . . , 19.., an execution was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said . . . county, in which county the defendant then resided.

IV. That the said execution was returned by said sheriff wholly unsatisfied.

V. That before the commencement of the action, and after the indebtedness had accrued upon which said judgment was obtained, the defendant was, and for several years previous thereto had been, engaged in mercantile business at . . . , California, and as the plaintiff is informed and believes, various persons became indebted to him to a large amount, and that the defendant had, at the time of the commencement of this action, moneys due him to a large amount, to-wit, to an amount not less, as plaintiff is informed and believes, than . . . dollars, a considerable portion of which are evidenced by charges on his books of account, which the said defendant refuses to produce, or allow to be examined by or on behalf of the plaintiff; and the plaintiff is, therefore, unable to specify, and cannot learn, and does not know, the particular items or amount of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of them, owing defendant in the aggregate a sum not less than . . . dollars, reside at . . . , and are solvent and able to pay the respective demands against them.

Wherefore the plaintiff demands:

I. That the said defendant be adjudged to apply to the payment of said judgment and interest thereon, together with the costs of this action, said property, debts, choses in action, and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested.

2. That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests.

3. That he be prohibited from making an assignment, or confessing any judgment to enable other creditors or persons to obtain a preference over plaintiff, or to take any portion of defendant's property.

4. That a receiver be appointed of all said property, equitable interests, things in action, and effects of the said defendant, and that said defendant be directed to execute to him an assignment thereof, and that said receiver sell or otherwise dispose of the same, and convert the same into money, as soon as may be, and apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the plaintiff's said debts, with interest and costs of this action.

§ 2212. Against debtor and his trustee—To reach trust fund or income.

Form No. 582.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege judgment, execution, and return.]

II. That the defendant [A. B.] is the beneficiary under a trust created by deed heretofore executed by him, of which a copy is hereto annexed, marked "Exhibit A."

III. That the fund, consisting of about . . . dollars, is now in the hands of the defendant [C. D.] as trustee, and the defendant [A. B.] is entitled to receive, and does receive, annually, the sum of . . . dollars therefrom.

Wherefore the plaintiff demands judgment:

That the defendants be enjoined respectively from paying over and from receiving said fund, and that the same be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action.

§ 2213. Against debtor, seeking to set aside a fraudulent transfer of his assets.

Form No. 583.

[TITLE.]

The plaintiff complains, and alleges:

I, II, and III. [Allege judgment and issue and return of execution, as in previous forms.]

IV. That on the . . . day of . . . , 19.., said A. B. was a merchant doing business at . . . , and was possessed of [designate assets].

V. That on that day, and after the indebtedness for which the plaintiff's judgment was recovered had accrued, the said defendant A. B., in contemplation of and with full knowledge of his

insolvency, made a pretended sale of his said stock to the defendant C. D., then a clerk in his employ, and took in payment therefor his promissory note having several months to run, but for what exact amount the plaintiff does not know and cannot state.

VI. That the plaintiff C. D. was and is wholly irresponsible and insolvent, and has no means of paying his said note, except such moneys as he may derive from tne sale of the property transferred to him as aforesaid.

VII. That thereafter and ôn the said day the said A. B. executed and delivered to the defendant E. F. an instrument in writing, of which the following is a copy: [Copy of assignment.]

VIII. That the property so assigned is of the value of about . . . dollars.

IX. That the said note of the said C. D., and the said assignment to E. F., were intended by each and all of the aforesaid defendants to be one transaction, and were in fact one transaction, and were intended for the purpose of delaying, hindering, and defrauding the creditors of said A. B., by putting it out of the power of such creditors to reach the stock and assets of the said A. B.; that such sale and assignment were not, nor was either of them, followed by immediate and continued change of possession; that ever since the said sale and assignment and up to the present time, the said property has remained in the actual possession and under the control of the said A. B., who has retained possession and control thereof under the pretense that he is agent of said C. D.

X. That the defendant A. B. has not any property other than that embraced in the sale and assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part, and that unless the said property can be applied to the payment of said judgment, the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That the said sale by the defendant A. B. to the said C. D. and said assignment by the defendant A. B. to the defendant E. F., may each be declared fraudulent and void as against this plaintiff.

2. That a receiver of all the property and effects of the said A. B., which he had at the time of the said sale to the defendant C. D., or at any time thereafter, be appointed.

3. That the defendants C. D. and E. F. be adjudged to account

for all the property received by them under either the sale or assignment aforesaid, and for all proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That the defendants be in the mean time enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith.

5. That the said receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay out of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the order of this court.

§ 2214. Allegation where value of assets is not sufficient to satisfy the debt.

Form No. 584.

That assets to the value of . . . dollars have been delivered by the executor to the next of kin of the deceased, but the value of said assets so delivered is not sufficient to satisfy the plaintiff's demand.

§ 2215. Against heir, for debt of ancestor.

Form No. 585.

[TITLE.]

The plaintiff complains and alleges:

1. [Allege facts, showing debt of ancestor due, and still unpaid.]

II. That on the . . . day of . . . , 19.., at . . . , said A. B. was owner in fee of certain property hereinafter described, and that on the same day said A. B. died intestate; and that more than . . . years before this action, to-wit, on the . . . day of . . . , 19.., letters of administration upon the estate of said A. B. were issued by the probate court of . . . county, in this state, appointing one C. D. administrator of all the goods, chattels, and credits of said deceased.

III. That the defendant is the sole heir of said deceased, and that the following-described premises descended from deceased to him as such: [Description of premises.]

IV. That the personal assets of said A. B. were not sufficient to pay and discharge the plaintiff's demand.

Wherefore plaintiff demands judgment:

That said premises be sold, and the sum of . . . dollars, with interest thereon from the . . . day of . . ., 19.., together with costs of this action, be paid to the plaintiff out of the proceeds thereof.

§ 2216. Allegation where heir or devisee has aliened the land.

Form No. 586.

That on the . . . day of . . ., 19.., the defendant conveyed the said premises to one G. H., and that the premises so conveyed by him were reasonably worth . . . dollars.

§ 2217. Against next of kin for debt of ancestor.

Form No. 587.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege cause of action and show debt still unpaid.]

II. That on the . . . day of . . ., 19.., at . . ., said A. B. died intestate; and that on the . . . day of . . ., 19.., letters of administration upon the estate of said A. B. were granted to C. D. by an order made by the superior court of the county of . . ., in this state, appointing said C. D. administrator of the estate of said deceased.

III. That before the commencement of this action said administrator paid over assets of the estate to the defendant who is one of the next of kin of the deceased, amounting to the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 2218. Against legatee for debt of decedent.

Form No. 588.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege cause of action, and show debt still unpaid.]

II. That on the . . . day of . . ., 19.., at . . ., said A. B. died, leaving a last will and testament by which one C. D. was appointed sole executor thereof, and that on the . . . day of . . ., 19.., said will was duly proved and admitted to probate in the superior court of . . . county, in this state, and letters testamentary were thereupon issued to said C. D. by said superior court.

III. That by said will the said A. B. bequeathed a legacy of . . . dollars to the defendant.

IV. That before the commencement of this action said executor paid over to the defendant, as such legatee, the amount of said legacy [or . . . dollars, being part of said legacy], out of the assets of said estate.

[DEMAND OF JUDGMENT.]

§ 2219. Specific denials.

Form No. 589.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That there is no record remaining in said court of such recovery as the plaintiff has alleged.

II. That the said A. B. has goods and chattels, lands, and tenements, liable to execution for the satisfaction of money due on the said judgment.

III. That the said A. B. has no goods or chattels or effects of the said plaintiff in his hands.

§ 2220. Denial that conveyance was fraudulent.

Form No. 590.

That upon the making of the alleged assignment [or, mortgage] there was an actual and continued change of the possession of the assigned [or, mortgaged] property, from the said [debtor] to the [transferees], who immediately after the execution of the assignment [or, mortgage] took actual and exclusive possession of the property; and that it has at all times since the assignment [or, mortgage] remained in their exclusive protection and control.

§ 2221. Denial of possession of assets.

Form No. 591.

That he had not, at the commencement of this action, nor has he had at any time since, property of the defendant [debtor] in his possession or under his control, as alleged, or at all, or in any manner.

§ 2222. Denial of execution.

Form No. 592.

That no execution upon the said judgment was ever returned unsatisfied in whole or in part [or, was ever issued to the said . . .] before this action.

§ 2223. Denial of judgment.

Form No. 593.

That there is no record of the said judgment.

§ 2224. Defendant has assets.

Form No. 594.

That the defendant [judgment debtor] has, and at the commencement of this action had, real property [or, personal property, or both] in the county of . . . , in this state, liable to execution, and sufficient in value to satisfy said judgment, to-wit: [designating what].

§ 2225. Bona fide purchaser.

Form No. 595.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff ought not to have his action aforesaid; because he avers that the said defendant did, on the . . . day of . . . , 19.., buy of the said . . . the said lands and tenements *bona fide*, for the consideration of . . . dollars, he, the said . . . , being then seised in fee, and in possession thereof [here state how and when paid, and if notes were given, aver the giving of them], and without any fraud or intent to hinder or delay or defraud the said . . . , or the other creditors of the said . . . , and without any knowledge, information, or belief, at that time or previous thereto, that the said . . . sold the said premises with the intent charged in the said complaint.

CHAPTER LXXVI.

DEPOSITIONS.

§ 2226. **Defined.**—A deposition is a written declaration, under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. In all actions and proceedings where the default of the defendant has been duly entered, and in all proceedings to obtain letters of administration or for the probate of wills and the issuance of letters testamentary thereon, where, after due and legal notice, those entitled to contest the application have failed to appear, the failure of such persons to appear shall be deemed to be a waiver of the right to any further notice of any application or proceeding to take testimony by deposition, in such action or proceeding.[1] There is no provision placing a reporter's transcript in civil cases upon the footing of a deposition.[2] Shorthand notes of testimony given by a witness orally at a trial are not, when read before a grand jury, to be considered as a deposition.[3]

§ 2227. **Manner of taking.**—Depositions must be taken in the form of question and answer. The words of the witness must be written down in the presence of the witness, by the officer taking the deposition, or by some disinterested person appointed by him. It may be taken down in shorthand, in which case it must be transcribed into longhand by the person who took it down. When completed it must be carefully read to or by the witness, and corrected by him in any particular, if desired, by writing, or causing his corrections to be written in the body or margin of, or at the bottom of, the deposition, and must then be subscribed by the witness. The officer before whom the deposition is taken must write his initials near said corrections. If the parties agree in writing to any other mode, such mode must be followed.[4]

§ 2228. **When may be taken.**—The testimony of a witness in California may be taken by deposition in an action at any time

1 Code Civ. Proc., § 2004, as amended 1907.

2 People v. Grundell, 75 Cal. 301, 17 Pac. 214.

3 People v. Northey, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

4 Cal. Code Civ. Proc., § 2006, as amended 1907.

after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases: 1. Where the witness is a party or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended; 2. Where the witness resides out of the county in which his testimony is to be used; 3. Where the witness is about to leave the county where the action is to be tried; 4. Where the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend; 5. Where the testimony is required upon a motion, or any other case where the oral examination of the witness is not required; 6. When the witness is the only one who can establish a fact material to the issue.[5] It is within the discretion of the trial court to permit or refuse the taking of the deposition of a witness during the progress of a trial.[6]

§ 2229. **Before whom taken.**—The person taking the deposition must be one authorized by law, and should be named, unless the commission be directed to an officer by his official title.[7] Depositions in California may be taken before any judge or officer authorized to administer oaths.[8] An affidavit taken in another state of the United States to be used in California may be taken before a commissioner appointed by the governor of California to take affidavits and depositions in such other state, or before any notary public, or before a judge or clerk of a court of record having a seal.[9] Any affidavit taken in a foreign country to be used in California may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country.[10] The deposition of a witness out of the state may be taken upon a commission from the court, under the seal of the court, or, if from a justice's court, with a certificate of the clerk of the superior court attached, to the effect that the person issuing the commission was an acting justice of the peace at the date of the commission. The commission issues on five days'

5 Cal. Code Civ. Proc., § 2021. Under Oregon Code, see Roberts v. Parrish, 17 Or. 583, 22 Pac. 136.

6 Willard v. Mellor, 19 Colo. 534, 36 Pac. 148.

7 King v. Green, 7 Cal. App. 473, 94 Pac. 777.

8 Cal. Code Civ. Proc., § 2031.

9 Cal. Code Civ. Proc., § 2013.

10 Cal. Code Civ. Proc., § 2014.

notice, and may be directed to any notary public, judge, justice of the peace, or commissioner selected by the officer issuing it. If issued to a foreign country, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties.[11]

§ 2230. **Competency of witness.**—To make the testimony of a witness admissible, he must be competent at the time of the taking of the deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him.[12] The death of a party to an action, and the substitution of his legal representative, subsequent to the commencement of suit against him, will not render inadmissible in evidence the deposition of an adverse party in interest, when, at the time such deposition was taken, the testimony of the witness was competent.[13] Where the parties stipulated that a deposition which had been taken in another action should be used on the trial, "with the same force and effect, subject to the same exceptions, as if taken in this case," and the party objecting had attended at the examination in such former case without objecting to the competency of the witness, it was held that the stipulation was a waiver of any objections to the competency of the witness.[14]

§ 2231. **How taken.**—Where a deposition of a party to the suit is taken *ex parte*, though after notice, and the witness is, therefore, not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it.[15] A party who appears at the taking of a deposition and examines the witness, without objecting to his competency, cannot afterwards interpose that objection.[16] The deposition of a party to a civil action may be taken, notwithstanding he is confined in jail.[17]

11 Cal. Code Civ. Proc., § 2024; Cal. Stats. 1909, p. 965. See, also, Alaska Codes, pt.. 4, ch. 64, §§ 642-658; Ariz. Civ. Code, pars. 2506-2532; Idaho Rev. Codes, §§ 6071-6074; Mont. Rev. Codes, § 8002; Nev. Comp. Laws, § 3507; N. Mex. Comp. Laws, §§ 3014-3067; Or. B. & C. Codes, §§ 989, 990; Utah Rev. Stats., §§ 3450-3452; Wash. Bal. Codes, §§ 6017-6030.

12 Kimball v. Gearhart, 12 Cal. 27.

13 Neis v. Farquharson, 9 Wash. 508, 37 Pac. 697.

14 Brooks v. Crosby, 22 Cal. 42.

15 Spring v. Hill, 6 Cal. 17.

16 Brooks v. Crosby, 22 Cal. 42.

17 Maxwell v. Rives, 11 Nev. 213. As to how depositions must be taken

§ 2232. When admissible.—A deposition taken under a stipulation which provides for the admission of the deposition without conditions is governed by the stipulation, and not by the statutory provisions.[18] Depositions, if properly taken, may be used by either party upon the trial, against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial unless the same was stated at the time of the examination. And where defendant had copies of corporation records incorporated in the deposition of plaintiff, the plaintiff upon trial may use the deposition in place of the original records.[19] If the deposition be taken under subdivisions 2, 3, or 4 of section 2021 of the California Code of Civil Procedure, proof must be made at the trial that the witness continues absent or infirm, or is dead. The only case in which the presence of a witness whose deposition has been taken is required, if it can be procured at the trial, is where the deposition was taken under the sixth subdivision of said section, which provides for the taking of a deposition "when the witness is the only one who can establish facts or a fact material to the issue."[20] The presence or absence of a party whose deposition has been taken is immaterial, and such deposition may be read on the trial by either party, though the witness be in court when it is read, and though other witnesses are present by whom the same facts can be proved.[21] The deposition may be read, in case of the death of the witness.[22] The only legal exception which is waived, if not made at the taking, where the party attends, is as to the form of the interrogatory.[23] But objection must be made when the deposition is offered in evidence.[24] A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial.[25] The deposition of a surveyor who ran the boundary line of a grant, taken in one action, is admissible in another action

when taken out of the state, see Cal. Code Civ. Proc., §§ 2024-2028; when taken within the state, see same code, §§ 2031-2038. As to stipulation of parties as to taking deposition of witness out of state, see Palmer v. Uncas Min. Co., 70 Cal. 614, 11 Pac. 666.

18 People v. Grundell, 75 Cal. 301, 17 Pac. 214.

19 Madera Ry. Co. v. Raymond Granite Co., 3 Cal. App. 668, 87 Pac. 27.

20 Johnston v. McDuffee, 83 Cal. 30, 23 Pac. 214.

21 Id.; Newell v. Desmond, 74 Cal. 46, 15 Pac. 369.

22 Cal. Code Civ. Proc., § 2032.

23 Lawrence v. Fulton, 19 Cal. 684.

24 Hobbs v. Duff, 43 Cal. 485.

25 Turner v. McIlhaney, 8 Cal. 575.

between different parties, as hearsay evidence upon the location of such lines, after his death. Hence, the deposition of Vioget as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties.[26]

§ 2233. When admissible—Continued.—A deposition taken and returned, as provided in the code, may, except as provided in section 2032, be read in evidence by either party at any stage of the action or proceeding in which it was taken, or in any other action or proceeding between the same parties or their privies or successors in interest, upon the same subject, and is then deemed the evidence of the party reading it; but the court may exclude the same if it appears that the taking thereof was in any material respect unfair.[27]

§ 2234. When admissible — Continued. — The party upon whose application depositions have been taken is not bound to offer them in evidence at the trial, but may resort to other evidence. And his failure to use the depositions is not a ground of surprise, for which a new trial should be granted.[28] If a party has been offered as a witness in his own behalf, and fully examined, and is present in court, it is wholly in the discretion of the court to refuse to allow his counsel to read his deposition taken before the trial.[29] A deposition which is taken in an action between two parties, and is admissible in such action, is admissible in an action between their successors in interest upon the same subject and involving the same issues.[30] But it is otherwise of a deposition taken in a different suit between different parties.[31] The showing that a witness is out of the state is held sufficient to admit his deposition if it appears that, in answer to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but

26 Morton v. Folger, 15 Cal. 275.

27 Cal. Code Civ. Proc., § 2022, as amended 1907.

28 Heath v. Scott, 65 Cal. 548, 4 Pac. 557. See Smith v. Crocker, 38 N. Y. Supp. 268, 73 N. Y. St. Rep. 749.

29 Grigsby v. Schwarz, 82 Cal. 278, 22 Pac. 1041.

30 Briggs v. Briggs, 80 Cal. 253, 22 Pac. 334; Atkins v. Anderson, 63 Iowa, 743, 19 N. W. 323; Kerr v. Gibson, 8 Bush, 130; Adams v. Raigner, 69 Mo. 363.

31 New York etc. Land Co. v. Weidner, 169 Pa. St. 359, 32 Atl. 557.

understood that he was out of the state.[32] Section 686 (subd. 3) of the Penal Code of California provides that the deposition of a witness may be used in criminal actions on its being satisfactorily shown to the court that the witness cannot with due diligence be found in the state.[33] The reasons which authorized depositions, and which existed at the time they were taken, will be presumed as still in existence at the time of the trial, nothing appearing to the contrary;[34] but, in Oregon, where the depositions of infirm witnesses were taken under an order of the court, granted on proof of their infirmity, the statute[34a] did not obviate the necessity of proof of the continuance of such infirmity, in order to authorize the use of such depositions.[35]

§ 2235. **The affidavit—By whom made.**—This affidavit may be made by any person acquainted with the facts, if no stay of proceedings is desired.[36] But if otherwise, it will be better that the affidavit should be made by the applicant, or an excuse be given for its not being so made.[37] The applicant, and not his attorney, should make the affidavit.[38]

§ 2236. **What it must show.**—It is not necessary to state what facts are expected to be proved by the witness.[39] And advice of counsel as to the same,[40] that witness is absent and will continue absent, must be stated.[41]

§ 2237. **Notice.**—The party desiring to take a deposition within California must serve on the adverse party a previous notice of the time and place of examination, together with a

32 Renton v. Monnier, 77 Cal. 449, 19 Pac. 820. See Sunol v. Molloy, 63 Cal. 369; Bronner v. Frauenthal, 37 N. Y. 166; People v. Goodrich, 142 Cal. 216, 75 Pac. 796.

33 People v. Lewandowski, 143 Cal. 574, 77 Pac. 467.

34 Hennessy v. Niagara Fire Ins. Co., 8 Wash. 91, 40 Am. St. Rep. 892, 35 Pac. 585.

34a B. & C. Codes, § 788.

35 Carter v. Wakeman, 45 Or. 427, 78 Pac. 362.

36 Demar v. Van Zandt, 2 Johns. Cas. 69.

37 See Eaton v. North, 7 Barb. 631.

38 Zeigler v. Lamb, 5 App. Div. 47, 40 N. Y. Supp. 65. See Clark v. Sullivan, 8 N. Y. Supp. 565, 55 Hun, 604. See, as to postponement, Cal. Code Civ. Proc., § 2027.

39 Eaton v. North, 7 Barb. 631. As to the materiality of the witness, see same case, p. 632.

40 Beall v. Dey, 7 Wend. 513.

41 Pooler v. Maples, 1 Wend. 65. As to requisites of affidavit under the New York practice, see Seymour v. Strong, 19 Wend. 98; Warner v. Har-

copy of an affidavit showing that the case is one mentioned in the statute. Such notice must be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.[42] Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule.[43] A notice of the taking of a deposition in the city of San Francisco, not designating any place in the city where it would be taken, is insufficient.[44] An order providing for the taking of a deposition at a certain hour of the day on which the order was made, and directing a service of the notice "forthwith," is too indefinite.[45] An order shortening the time for which notice shall be given must designate a definite time of notice.[46] One claiming to be injured by reason of insufficient notice should promptly move to suppress the deposition.[47] Notice must be served upon the attorney for the party, where he has one.[48] But proof of service of the notice may be made by parol testimony.[49] A slight error in the title of the cause, where there is no other suit pending between the parties, will not invalidate the notice.[50]

If an adverse party is in default for not appearing and answering within the time allowed by the law or the court, or if, in a special proceeding, some or all of the parties interested have not appeared, the court may authorize a deposition to be taken without the service of any affidavit upon, or the giving of any notice

vey, 9 Wend. 444; Brackett v. Dudley, 1 Cow. 209; Matter of Gains, 36 N. Y. Supp. 1113, 25 Civ. Proc. Rep. 243.

42 Cal. Code Civ. Proc., § 2031. See, also, Cal. Code Civ. Proc., § 1005; Alaska Codes, pt. 4, ch. 64, §§ 642-658; Ariz. Civ. Code, pars. 2506-2532; Idaho Rev. Codes, §§ 6059-6074; Mont. Rev. Codes, § 8007; Nev. Comp. Laws, § 3503; N. Mex. Comp. Laws, §§ 3041-3067; Or. B. & C. Codes, § 835; Utah Rev. Stats., §§ 3325, 3456; Wash. Bal. Codes, § 6020.

43 Williams v. Chadbourne, 6 Cal. 559.

44 Lucas v. Richardson, 68 Cal. 618, 10 Pac. 183.

45 Howell v. Howell, 66 Cal. 390, 5 Pac. 681.

46 Id. See Bem v. Bem, 4 S. Dak. 138, 55 N. W. 1102.

47 Kelly v. Ning Yung etc. Co., 2 Cal. App. 460, 84 Pac. 321.

48 Griffith v. Gruner, 47 Cal. 644; Cal. Code Civ. Proc., § 1015.

49 Hobbs v. Duff, 43 Cal. 485.

50 Mills v. Dunlap, 3 Cal. 94. See, also, Cal. Code Civ. Proc., § 1046.

to, the party so in default or not appearing, or may provide that notice be given him in such mode as to the court may seem proper.[51]

§ 2237a. Waiver of notice.—An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short.[52] Depositions should not be excluded for the reason that the interpleader was not served with notice of their taking.[53] An objection to the incompetency of a witness making a deposition, not reaching the incompetency or irrelevancy of the evidence given by him, should not be heard where no written exception to the deposition is filed.[54] Objections to a deposition on a ground going only to the time or manner of taking the same must be presented by a motion to suppress, and cannot be made for the first time at the trial.[55]

§ 2238. Deposition of witness out of state.—The deposition of a witness out of the state may be taken upon a commission issued from the court, under the seal of the court, upon an order of the court, or a judge or a justice thereof, on the application of either party, upon five days' previous notice to the other. If the court is a justice's court, the commission must have attached to it a certificate of the clerk of the superior court of the county in which such justice's court is held, under the seal of such superior court, to the effect that the person issuing the same was an acting justice of the peace at the date of the commission. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or, if they do not agree, to any notary public, judge, justice of the peace, or to any commissioner selected by the court or judge or justice issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties.[56]

51 Cal. Code Civ. Proc., § 2023, as amended March, 1907.

52 Jones v. Love, 9 Cal. 68. See Hobart v. Jones, 5 Wash. 385, 31 Pac. 879.

53 Miller v. Campbell Commission Co., 13 Okla. 75, 74 Pac. 507.

54 Crebbin v. Jarvis, 64 Kan. 885, 67 Pac. 531.

55 Oliver v. Oregon Sugar Co., 45 Or. 77, 76 Pac. 1086.

56 Cal. Code Civ. Proc., § 2024, as amended 1909; Stats., 1909, p. 965.

§ 2239. Commission, what to contain.—The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or, when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk, if there be one, and if not, to the judge thereof, and forwarded to him by mail or other usual channel of conveyance.[57] In general, witnesses to be examined under a commission must be named in it.[58] Where the names are not known to the party, if they are sufficiently described, and their evidence is shown to be material, the commission may be issued describing them.[59] The real name of the person intended to be examined under the commission must be given to the opposite party and inserted in the commission, in order that the opposite party may intelligently prepare cross-interrogatories.[60] The want of a seal to the commission is a fatal defect.[61]

§ 2240. Interrogatories, settlements of.—The party moving for the commission must, unless it is waived by the other party, attach to the motion the interrogatories upon which he desires it to be taken. On the hearing of the motion, the other party must propose such cross-interrogatories as he may desire. If the parties do not agree as to the form of the interrogatories, the court must settle their form, but such agreement or settlement does not preclude either party, when the deposition is offered in evidence, from interposing any objection to any interrogatory except as to the form thereof. The settlement of interrogatories may be had at the time of the hearing of the motion, or at any other time which the court may appoint. The moving party may be allowed two days to propose such redirect interrogatories. When agreed upon, the interrogatories must be annexed, or when parties agree to that mode, or the court so directs, the

57 Cal. Code Civ. Proc., § 2026, as amended 1907.

58 Wright v. Jessup, 3 Duer, 642; Forrest v. Forrest, 3 Bosw. 661, 9 Abb. Pr. 289.

59 Shafer v. Wilcox, 2 Hall, 502. As to the effect of a misnomer, compare Hays v. Phelps, 1 Sandf. 64; Brown v. Southworth, 9 Paige Ch. 351; Blackett v. Laimbeer, 1 Sandf. Ch. 366; Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

60 Smith v. Westerfield, 88 Cal. 374, 26 Pac. 206.

61 Ford v. Williams, 24 N. Y. 359; Tracy v. Suydam, 30 Barb. 110; Whitney v. Wynkoop, 4 Abb. Pr. 370.

examination must be without written interrogatories.[62] Documents to be identified by the witness, or copies of them, may be annexed to the interrogatories;[63] and it is not essential that the originals should be thus attached.[64] Nor can either party be compelled to surrender an original document for this purpose.[65] Objections annexed to the commission and interrogatories, but not called to the attention of the court on the trial, may properly be disregarded.[66]

§ 2241. **Issuance of commission.**—If a commission to take the deposition of a witness out of the state is issued on the application of one party, without consent of the other, to a person who is not a judge or justice of the peace, or a commissioner appointed by the governor of the state, and the party who does not consent, after the appointment, files cross-interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed.[67] The probate court may issue a commission to take a deposition.[68] If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken.[69]

§ 2242. **Subpœna of witness—Under commission.**—If a commission to take such testimony has been issued by the court before which such action or proceeding is pending, or by a judge thereof, on exhibiting the commission to the superior court of the county in which the witness resides, with an affidavit showing the materiality of his testimony, such superior court may issue

62 Cal. Code Civ. Proc., § 2025, as amended 1907.

63 Commercial Bank v. Union Bank, 11 N. Y. 203.

64 Id.

65 Butler v. Lee, 32 Barb. 75, 19 How. Pr. 383.

66 Farrell v. Palmer, 36 Cal. 187. As to the practice of settlement under the California practice, and that examination may be without interrogatories, consult Cal. Code Civ. Proc., § 2025. Under New York practice, see Gilpin v. Daly, 12 N. Y. Supp. 448; Dent v. Society etc., 16 N. Y. Supp. 684; Krauss v. Hallbeimer, 23 Civ. Proc. Rep. 317, 29 N. Y. Supp. 1106; Wilcox v. Dodge, 23 Abb. N. C. 209, 6 N. Y. Supp. 368.

67 Crowther v. Rowlandson, 27 Cal. 383. As to issuance of commission, see Hames v. Judd, 16 Daly, 110, 9 N. Y. Supp. 743; Spinney v. Field, 17 N. Y. Supp. 890; In re Plumb, 64 Hun, 317, 19 N. Y. Supp. 79.

68 Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

69 Elgin v. Hill, 27 Cal. 373.

a subpœna to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place within such county.[70] This section applies only to proceedings to take depositions to be used in sister states.[71]

§ 2243. **Subpœna of witness—No commission being issued.**—If a commission has not been issued, and it appears to a judge of the superior court, or to a justice of the peace, by affidavit satisfactory to him, that the testimony of the witness is material to either party, and that he resides in the county in which such judge or justice holds office; that a commission to take the testimony of such witness has not been issued; that, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding—he must issue his subpœna requiring the witness to appear and testify before him at a specified time and place.[72]

§ 2244. **Issuance of subpœna.**—To require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action or proceeding pending therein, a subpœna is issued by the clerk of the court in which the action or proceeding is pending, under the seal of the court, or if there is no clerk or seal, then by a judge or justice of such court; to require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by the clerk of the superior court of the county in which the witness is to be examined, under the seal of such court; to require attendance out of court, in cases not above provided for, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of California, it is issued by the judge, justice, or other officer before whom the attendance is required. If the subpœna is issued to require attendance before a court, or at the trial of an issue therein, it is issued by the clerk, as of course, upon the application of the party desiring

70 Cal. Code Civ. Proc., § 2036, as amended 1907.

71 Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

72 Cal. Code Civ. Proc., § 2037, as amended 1907.

it. If it is issued to require attendance before a commissioner or other officer upon the taking of a deposition, it must be issued by the clerk of the superior court of the county wherein the attendance is required, upon the order of such court, or of a judge thereof, which order may be made *ex parte*.[73]

§ 2245. **Disobedience to subpœna—How punished.**—In California, disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpœna. When the subpœna, in any such case, requires the attendance of the witness before an officer or commissioner out of court, it is the duty of such officer or commissioner to report any such disobedience or refusal to the court issuing the subpœna; and the witness must not be punished for any refusal to answer a question, or to subscribe an affidavit or deposition, unless, after a hearing upon notice, the court orders him to so answer or subscribe, and then only for disobedience to such order. Any judge, justice, or other officer mentioned in subdivision 3 of section 1986 of the Code of Civil Procedure may report any such disobedience or refusal to the superior court of the county in which such attendance was required; and such court thereupon has power, upon notice, to order the witness to perform the omitted act, and refusal or neglect to do so may be punished as contempt of such court.[74] A judge of the superior court, before whom depositions are to be taken in a suit in the federal courts, has no jurisdiction to compel by attachment the attendance as a witness of a non-resident of the state who is beyond its boundaries, and who was served with a subpœna when temporarily within the state.[75] Prior to the amendment of 1907, the taking of a witness's deposition before a notary public, to be used in a pending action was a "proceeding of the court" within section 1209, and hence the court had power to punish such witness for his refusal to attend and be examined in pursuance of the notary's subpœna.[76] Where a deposition of a defendant in an action pending before the superior court is taken before a judge of such court, and the defendant refuses to answer any questions

73 Cal. Code Civ. Proc., § 1986, as amended 1907.

74 Cal. Code Civ. Proc., § 1991, as amended 1907.

75 State v. Kennan, 33 Wash. 247, 99 Am. St. Rep. 949, 74 Pac. 381.

76 Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597.

relating to the matters inquired about, the judge has power to punish him as for a contempt.[77]

One summoned as a witness is thereby connected with a judicial proceeding, and can be punished for contempt of court for failure to testify; but a justice or notary before whom the deposition of such a witness is being taken, in a case pending in the superior court, does not have the jurisdiction to punish such witness for the contempt.[78]

§ 2246. **Deposition as evidence.**—A deposition may be used at any stage of the action or proceeding.[79] The object of the statute is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken.[80] Where a deposition had been taken in a case, and subsequently an amended pleading was filed, it was held that the deposition might nevertheless be read, if the material issues on the subject-matter to which it related were the same under the amended as under the original pleadings.[81] A motion to suppress the reading of a deposition before the case in which it was taken is put upon trial is premature; the proper time to object to such deposition is when it is offered in evidence on the trial.[82] The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other.[83] But *quære*, whether a party can object, on second trial, to the reading of a deposition which he suffered his adversary to read on the first trial without objection.[84]

§ 2247. **Return.**—It is not essential, though it is the better practice, that the return should state that the witnesses were publicly sworn.[85] The direction of the officer who settles the interrogatories should be indorsed on the commission.[86] Where

77 Crocker v. Conrey, 140 Cal. 213, 73 Pac. 1006.

78 Gay v. Thorpe, 1 Cal. App. 312, 82 Pac. 221.

79 Cal. Code Civ. Proc., § 2034, repealed March, 1907. See Cal. Code Civ. Proc., § 2022.

80 Turner v. McIlhaney, 8 Cal. 575.

81 Pico v. Cuyas, 47 Cal. 174; Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872.

82 Mills v. Dunlap, 3 Cal. 94. See Pence v. Waugh, 135 Ind. 143, 34 N. E. 860.

83 People v. Kohler, 5 Cal. 72.

84 Myers v. Casey, 14 Cal. 542.

85 Williams v. Eldridge, 1 Hill, 249; Halleran v. Field, 23 Wend. 38. As to the directions for a return, see Hall v. Barton, 25 Barb. 274.

86 Hurd v. Pendright, 2 Hill, 502; Crawford v. Loper, 25 Barb. 449.

plaintiff's depositions were noticed to be taken on a certain day, but were not then taken, and the court was warranted in finding that the defendant had no notice of a continuance of the time for taking them, they were properly suppressed.[87]

§ 2248. **Deposition excluded.**—A whole deposition cannot be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions; otherwise, any error in permitting the questions will be waived.[88] An objection must particularly specify the grounds.[89] It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk.[90]

§ 2249. **Exceptions.**—Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination.[91] There is nothing in the statute which requires that exception to the deposition shall be filed before the time of trial. The objection can be made at any time before it is read in evidence.[92] If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing.[93] Objection to the answer made to a settled interrogatory is made too late after its reading in evidence.[94]

87 Bauer v. State, 144 Cal. 740, 78 Pac. 280.

88 Higgins v. Wortell, 18 Cal. 330. That where a witness refuses to answer a material question, it is not error for the court to exclude the whole deposition, see Hadra v. Utah Nat. Bank, 9 Utah, 412, 35 Pac. 508. See, also, § 2253, post.

89 King v. Green, 7 Cal. App. 473, 94 Pac. 777.

90 Williams v. Chadbourne, 6 Cal. 559.

91 Lawrence v. Fulton, 19 Cal. 683; Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101.

92 Dye v. Bailey, 2 Cal. 384. Under Colorado practice, that only such objections, exceptions, and motions in respect to depositions will be considered as are made before trial, see Cowan v. Cowan, 16 Colo. 335, 26 Pac. 934; Love v. Tomlinson, 1 Colo. App. 516, 29 Pac. 666. That objections to depositions for defects that may be remedied by retaking cannot be made at the trial, but must be taken before the trial is begun, see Sugar Pine Lumber Co. v. Garrett, 28 Or. 168, 42 Pac. 129; Foster v. Henderson, 29 Or. 210, 45 Pac. 899; Publishing Co. v. Mayne Co., 9 Utah, 318, 34 Pac. 247; Hill v. Smith, 6 Tex. Civ. App. 312, 25 S. W. 1079; Howard v. Stillwell etc. Mfg. Co., 139 U. S. 199, 35 L. Ed. 147, 11 Sup. Ct. 500; National Bank v. Dunn, 106 Ind. 110, 6 N. E. 131.

93 Myers v. Casey, 14 Cal. 542.

94 Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059.

§ 2250. **Form of deposition.**—The deposition of each witness must be reduced to writing under the direction of the commissioner,[95] and be subscribed by the witness.[96] And must be certified by the commissioner, who must make a return of the same in a sealed envelope, directed to the clerk of the court, or to the judge thereof, and forwarded to him by mail or other channel of conveyance.[97]

§ 2251. **Attestation.**—A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. The admission of hearsay testimony to a fact admitted by both parties is not error.[98] The attestation or certificate of a notary that an affidavit was sworn to, or affirmed and subscribed before him, is regular, although his seal is not affixed.[99] Courts take judicial notice of the official character of justices of the peace in their own states; and an affidavit in which the official character of the justice before whom it is taken does not appear is good.[100] And where it was stipulated by the attorneys for the parties that a deposition might be taken before L. P. F., a justice of the peace in a foreign country, it was held that this was a concession that there was such a person occupying such office, and an agreement upon that person to take the deposition.[101]

§ 2252. **Certificate of commissioner.**—If at the end of a deposition taken by a commissioner out of the state there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of compliance with section 430 of the California Practice Act[102] should be dated.[103] It is not necessary to append the statutory certificate to the deposition of each witness when two or more give their depositions for the same party at the same time, and before the

95 Keene v. Meade, 3 Pet. 1, 7 L. Ed. 581; McDonald v. Garrison, 9 Abb. Pr. 34.

96 But see Clarke v. Sawyer, 3 Sandf. Ch. 351. That the deponents subscribed their names by initials is no reason for suppressing the deposition, see Payne v. June, 92 Ind. 252.

97 Cal. Code Civ. Proc., § 2026.

98 Williams v. Chadbourne, 6 Cal. 559. See McCormick v. Largey, 1 Mont. 158.

99 Mills v. Dunlap, 3 Cal. 97.

100 Ede v. Johnson, 15 Cal. 53.

101 Blackie v. Cooney, 8 Nev. 41.

102 Cal. Code Civ. Proc., § 2032.

103 Elgin v. Hill, 27 Cal. 373.

same officer; one certificate in due form to all such depositions when securely attached together is sufficient.[104] A certificate of a notary to depositions, stating that the testimony was read over to the witness, "and being by him corrected, and was by him subscribed in my presence," is sufficient certification to the reading, correction, and signing.[105] It is immaterial whether a notary's certificate is at the beginning or end of a deposition.[106] Under the Colorado practice, all objections to the manner of certifying and returning a deposition are waived unless presented before the trial.[107]

§ 2253. **Failure to answer interrogatory—Objection.**—An objection to the admission in evidence of a deposition, on the grounds that the witness had neglected to answer certain interrogatories put by the party objecting, and that the deposition was not complete or responsive, in order to be available, must call the attention of the court to the particular interrogatories which the witness had refused to answer, or the answer to which was evasive or not fully responsive.[108]

§ 2254. **Ojections—Waiver.**—Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived, if the party against whom the depositions were offered dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their non-residence.[109] Failure to carry out parts of a stipulation in reference to the swearing of a witness on deposition, when such is not required by law, is not good ground for the suppression of the deposition.[110] An objection that the certificate to a deposition

104 Pralus v. Pacific Gold etc. Min. Co., 35 Cal. 30. As to sufficiency of certificate, consult Hobart v. Jones, 5 Wash. 385, 31 Pac. 879; Clark v. Ellis, 9 Or. 128; Metcalf v. Prescott, 10 Mont. 294, 25 Pac. 1037; Moore v. Booker, 4 N. Dak. 543, 62 N. W. 607; Payne v. West, 99 Ind. 390; Curtis v. Curtis, 131 Ind. 489, 30 N. E. 18.

105 Short v. Frink, 151 Cal. 83, 90 Pac. 200.

106 Murray v. Larabie, 8 Mont. 208, 19 Pac. 574.

107 Walker v. Steel, 9 Colo. 388, 12 Pac. 423. See, also, Murray v. Larabie, 8 Mont. 208, 19 Pac. 574. As to faulty certificate, see Argentine Falls etc. Min. Co. v. Molson, 12 Colo. 405, 21 Pac. 190.

108 Gassen v. Hendrick, 74 Cal. 444, 16 Pac. 242; Valton v. National etc. Co., 20 N. Y. 34.

109 Estate of Learned, 70 Cal. 140, 11 Pac. 587.

110 Knapp v. American Hand-Sewed Shoe Co., 63 Kan. 698, 66 Pac. 996.

did not show that the deposition was taken by the person to whom the commission was addressed, nor in the official capacity designated therein, must be taken by motion to suppress before the trial is begun; otherwise, it will be deemed waived.[111] In Oklahoma, all objections other than for incompetency and irrelevancy are waived, unless made and filed before trial.[112] Participating in taking of the deposition waives objection to the commission, or to insufficient notice.[113]

§ 2255. Opening depositions by mistake.—Depositions opened by the clerk by mistake, but at once sealed up and kept in his custody until regularly ordered to be published by the court, may, within the discretion of the court, be used upon the trial.[114]

§ 2256. Depositions—How taken on interrogatories.—The deposition of a witness residing in the state can only be legally taken on interrogatories under a commission directed to the officer, and it is irregular for the officer to take the deposition upon questions furnished by the attorney of a party to the cause of action.[115]

§ 2257. The same—Striking out answers.—Answers to interrogatories contained in a deposition, if based upon statements made by other persons to the witness, are hearsay, and should be stricken out on motion.[116] And if, in a deposition, an answer be not responsive to the interrogatory, it may be stricken out.[117]

§ 2258. Costs.—Expenses of taking depositions are properly put into a cost-bill as disbursements, though they were not used on trial, unless it appears they were actually unnecessary, or that for some special reason they should not be allowed.[118]

111 Sugar Pine Lumber Co. v. Garrett, 28 Or. 168, 42 Pac. 129. See, to same effect, Murray v. Larabie, 8 Mont. 208, 19 Pac. 574.

112 Root v. Coyle, 15 Okla. 574, 82 Pac. 648.

113 Palatine Ins. Co. v. Santa Fe Mer. Co., 13 N. Mex. 241, 82 Pac. 363; Kelly v. Ning Yung etc. Co., 2 Cal. App. 460, 84 Pac. 321.

114 Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872; Spear v. Richardson, 37 N. H. 23.

115 Nevitt v. Crow, 1 Colo. App. 453, 29 Pac. 749.

116 Amann v. Lowell, 66 Cal. 306, 5 Pac. 363.

117 Golden Gate etc. Min. Co. v. Joshua Hendy Machine Works, 82 Cal. 184, 23 Pac. 45.

118 Lindy v. McChesney, 141 Cal. 351, 74 Pac. 1034.

FORMS FOR DEPOSITIONS.

§ 2259. Affidavit for examination of witness.

Form No. 596.

[TITLE.]

[VENUE.]

A. B., being first duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. The summons in said action has been served. P. Q. is a witness material and necessary for me on the trial of said action, without the benefit of whose testimony I cannot safely proceed to trial; said witness resides in the said county of . . ., and is about to leave said . . . county, where said action is pending and is to be tried, and will probably continue absent when his testimony is required. [Or state other facts showing that the case is within section 2021 of the California Code of Civil Procedure.]

III. I am informed and verily believe that it is the intention of said witness to depart from said . . . county, on the . . . day of . . ., 19.. I was not aware of his intended departure in time to give five days' notice of the time and place of taking his deposition; and the attorneys for the said defendant reside at . . ., in said county.

[JURAT.] [SIGNATURE.]

§ 2260. Affidavit on motion for commission to examine witness out of state.

Form No. 597.

[TITLE.]

[VENUE.]

A. B., the plaintiff in the above-entitled action, being duly sworn, deposes and says:

That the summons in the said action has been served, and that P. Q. is a witness material and necessary for the said [plaintiff] on the trial of the said action, without the benefit of whose testimony the said [plaintiff] cannot safely proceed to trial; that said witness resides in the city of [New York, in the county of New York, in the state of New York], and is out of this state, and will continue absent when his testimony is required.

[JURAT.] [SIGNATURE.]

§ 2261. Notice of taking deposition of witness, and time and place of examination, with copy of affidavit.

Form No. 598.

[TITLE.]

You will please take notice, that the depositions of L. M. and N. O., on behalf of the plaintiffs in the above-entitled action, to be used on the trial thereof, will be taken before P. Q., a notary public in and for the county of . . . , in the state of California, at his office in the city of . . . , county of . . . , on the . . . day of . . . , 19.., between the hours of nine A. M. and five P. M. of that day; and if not completed on that day, the taking will be continued from day to day successively thereafter, and over Sundays, at the same place, until completed.

And you will further take notice that the annexed is a copy of an affidavit of S. T., one of the said plaintiffs, showing that the case is one mentioned in section 2021 of the California Code of Civil Procedure.

[DATE AND ADDRESS.] E. F., Attorney for Plaintiffs.

§ 2262. Order shortening time of notice.

Form No. 599.

Good cause being shown therefor, it is hereby ordered that the time of giving the foregoing notice is hereby shortened to two days.

[DATE.] A. B., Judge.

§ 2263. Notice of motion for commission to examine witness out of state.

Form No. 600.

[TITLE.]

The defendant and his attorney will please take notice, that upon the within affidavit, and upon the complaint and the papers filed in the above-entitled action, I shall move this honorable court, at the courtroom thereof, in the said county of . . . , on the . . . day of . . . , 19.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, that a commission issue out of and under the seal of this honorable court, to take the testimony of F. G., a witness residing out of this state,

directed to some proper person residing at the city of . . ., in the state of . . ., then and there to be selected and appointed by the judge of this court.

[DATE.] E. F., Attorney for Plaintiff.

§ 2264. Stipulation that deposition of witness may be taken in this state to be used on the trial.

Form No. 601.

[TITLE.]

It is hereby stipulated, that the deposition of R. S., a witness on behalf of the [plaintiff] in the above-entitled action, may be taken before T. U., a notary public [or any other officer or person agreed upon], in and for the county of . . ., in this state, at his office in said . . . county, on the . . . day of . . ., 19.., between the hours of . . . A. M. and . . . P. M. of that day, and, if not completed on that day, may be continued from day to day thereafter, and over Sundays, at the same place, until completed. And when so taken, the said deposition may be used on the trial of said action, subject to the same objections [except as to the form of the interrogatories] as if the said witness were there personally present and testifying therein.

[DATE.] G. H., Attorney for Defendant.

§ 2265. Interrogatories for issuance of commission.

Form No. 602.

[TITLE.]

Interrogatories to be propounded to L. M., Esq., of the city of . . ., county of . . ., and state of . . ., a witness to be produced, sworn, and examined on the part of the above-named plaintiff [or, defendant], under a commission to be issued out of and under the seal of the court, and directed to O. P., Esq., of the city of . . ., county of . . ., and state of . . ., and to such other person as may be named commissioner on the part of the defendant [or, plaintiff] above named:

First interrogatory. What is your name, age, residence, and occupation?

Second interrogatory. Do you know the parties to the above-entitled action, or either of them, and, if yea, how long have you known such parties or party?

[Continue with the questions, numbering each, and add the following final question:]

Last interrogatory. Do you know or can you state any matter or thing that may tend to the benefit or advantage of either or any of the parties to this action? If yea, state the same fully and at large in your answer hereto, as if specially interrogated.

E. F., Plaintiff's [or, Defendant's] Attorney.

§ 2266. Cross-interrogatories, with proposal of additional commissioner.

Form No. 603.

[TITLE.]

Cross-interrogatories to be propounded to L. M., of . . ., county of . . ., state of . . ., before O. P., Esq., a commissioner to be appointed to take the deposition of said witness on behalf of the plaintiff [or, defendant], and also Q. R., Esq., of . . ., an additional commissioner whom the defendant [or, plaintiff] now proposes to act with said O. P., the said deposition to be used upon the trial of the above-entitled action on the part of the plaintiff [or, defendant].

First interrogatory. [Insert and number all the interrogatories.]

G. H., Defendant's [or, Plaintiff's] Attorney.

§ 2267. Order for commission to take testimony.

Form No. 604.

[TITLE.]

Upon reading and filing the affidavit of A. B., and upon the files, papers, and records in this action, and due proof of service of notice of motion having been made and filed, on motion of G. H., Esq., attorney for the defendant in said action:

It is ordered, that a commission issue out of and under the seal of this court, directed to J. K., a person agreed upon between the parties, residing at the city of . . ., county of . . ., in the state of . . ., to take the testimony of P. Q., residing at the same place, as a witness on behalf of the defendant, upon such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties shall disagree as to their form, by the honorable judge of this court, on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon, at the courtroom of this court.

[DATE.] [SIGNATURES.]

§ 2268. Commission to take testimony.

Form No. 605.

The People of the State of California to A. B., greeting:

Whereas, it appears to our judge of our superior court of the county of . . ., state of California, that . . ., of the . . . of . . ., in the . . . of . . ., is a material witness in a certain action now pending in our said superior court, between . . ., plaintiff, and . . ., defendant, and that the personal attendance of said witness cannot be procured at the trial of the said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witness; and, therefore, we authorize and empower you, at certain days and places, to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to his commission, and upon . . ., on . . . oath, first taken before you, and cause the said examination of the said witness to be reduced to writing and signed by the same witness and by yourself, and then return the same annexed to this commission, unto our superior court aforesaid, with all convenient speed, inclosed under your seal.

Witness, Hon. . . ., judge of the said superior court, at the . . ., in the county of . . ., this . . . day of . . ., 19..

Attest my hand and seal of said superior court, the day and year last above written.

[SEAL OF COURT.] C. D., Clerk.

§ 2269. Deposition.

Form No. 606.

[TITLE.]

Be it remembered, that pursuant to the stipulation [commission or notice] hereunto annexed, and on the . . . day of . . ., 19.., at my office, in the county of . . ., state of . . ., before me, N. O., a notary public in and for the said county of . . ., duly appointed and commissioned to administer oaths, etc., personally appeared P. Q., a witness produced on behalf of the plaintiff in the above-entitled action now pending in the said court, who, being first by me duly sworn, was then and there examined and interrogated by E. F., of counsel for the said plaintiff, and by G. H., of counsel for the said defendant, and testified as follows: [Questions and answers.]

§ 2270. Form of deposition taken upon notice.

Form No. 607.

[VENUE.]

Deposition of L. M., a witness taken before me at my office in the city of . . . , in said county, on the . . . day of . . . , 19.., pursuant to the annexed notice [or, stipulation] to be used on the part of the plaintiff [or, defendant] in a certain action now pending in the . . . court for . . . county, state of . . . , wherein A. B. is plaintiff and C. D. is defendant.

The said witness, being first duly sworn by me to testify the truth, the whole truth, and nothing but the truth relative to said action, in answer to oral interrogatories propounded by E. F., who appeared for the plaintiff, deposed and made answer as follows:

My name is L. M.; my age is . . . years. I reside, and have since [give time] resided, at . . . I know the parties to the action mentioned.

Question. [Here write out question in full.]

Objected to by defendant on the ground [state ground given].

Answer. [Give answer.]

Upon cross-examination the witness testified as follows:

[Here follow with cross-examination and re-examination, if any, in the same manner as with direct examination.]

[Upon concluding let the witness read over the testimony and make all corrections which he desires at the foot of the whole deposition, and then let him sign at the end of the whole.]

O. P., [official title].

§ 2271. Certificate to be attached to foregoing.

Form No. 608.

I, O. P., [add official designation], in and for said county, do hereby certify that the above-described deposition was taken before me at my office, in the town of . . . , in said county, on the . . . day of . . . , at . . . o'clock, . . . noon; that it was taken at the request of the plaintiff [or, defendant, or other person procuring it], upon verbal [or, written] interrogatories; that it was reduced to writing by myself [or, by deponent; or, by L. M., a disinterested person, in my presence and under my direction]; that it was taken to be used in the action of A. B. v. C. D., now

pending in the . . . court [or to be used in some proceeding or matter, mentioning it]; and

That the reason for taking such deposition was [here state the true reason]; that C. D. attended at the taking of such deposition [or, that a notice of which the annexed is a copy was served upon C. D., on the . . . day of . . ., 19..; or, that the deposition was taken in pursuance of the annexed stipulation]; that said deponent before examination was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and that said deposition was carefully read to [or, by] said deponent, and then subscribed by him.

O. P., [official designation].

§ 2272. Certificate of notary.

Form No. 609.

STATE OF CALIFORNIA,
CITY AND COUNTY OF . . . } ss.

I, G. H., a notary public in and for said . . . county, do hereby certify that the witness P. Q., in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed stipulation [commission or notice], to-wit, at my office in said county of . . ., in the state of . . ., and on the . . . day of . . ., 19.., between the hours of . . . and . . . of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness; and being by him corrected, was by him subscribed in my presence.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office, this . . . day of . . ., 19..

G. H., Notary Public.

§ 2273. Certificate by stenographer.

Form No. 610.

[VENUE.]

I, O. P., [give official title], a stenographer, hereby certify that in pursuance of the annexed notice [or, commission] caused to come before me at . . ., on the . . . day of . . ., 19.., between the hours of . . . o'clock in the forenoon and . . . o'clock in the afternoon, [names of witnesses], who were then

and there duly sworn [or, affirmed] and examined; that their examination was by me correctly taken down in shorthand, and was by me correctly extended into longhand, and when so extended was read to said witnesses respectively in my presence, and the same was then subscribed and sworn to by said witnesses respectively in my presence, and such extension is [and said shorthand notes are] now herewith returned as the depositions of the said witnesses. I further certify that before beginning the taking of said depositions in shorthand I took and subscribed an oath to take down and transcribe correctly such testimony, and said oath is hereto attached. I further certify that the translation of my said shorthand notes so taken is a full, true, and complete translation thereof.

I further certify that E. F. was present and conducted the examination on behalf of the plaintiff, and G. G. was present and cross-examined said witnesses for the defendant [as the case may be].

Witness my hand [and official seal hereto annexed] at . . ., in the county of . . ., state of . . ., this . . . day of . . ., 19..

[SEAL.] [SIGNATURE.]

§ 2274. Certificate of mailing—Indorsed on envelope.

Form No. 611.

Deposited in the post-office at . . ., and the postage thereon paid by me, this . . . day of . . ., 19..

. . ., Commissioner.

§ 2275 Notice of motion to suppress deposition.

Form No. 612.

[TITLE.]

Sir: Please take notice, that upon the deposition of L. M., on file in this action [and upon the affidavit hereto annexed, if an affidavit be made], the [defendant], by his counsel, will move the court, at [etc.], at the opening of court on that day, or as soon thereafter as counsel can be heard, to suppress said deposition on the ground that [here specify the grounds].

[DATE.] G. H., Attorney for [Defendant].

[ADDRESS.]

§ 2276. Order suppressing deposition.

Form No. 613.

[TITLE.]

The motion of the [defendant] above-named to suppress the deposition of L. M., heretofore taken in this action, having come on to be heard before the court on this . . . day of . . . , 19.., on reading and filing the affidavit of C. D., and upon the pleadings in said action and the said deposition, after hearing G. H., Esq., attorney for [defendant], and E. F., Esq., attorney for the [plaintiff], and being now fully advised in the premises:

Ordered, that the deposition of L. M., taken herein under commission, on the . . . day of . . . , 19.., before O. P., Esq., [commissioner, or designate officer], be suppressed and be not received in evidence in this action.

That the [plaintiff] pay to the [defendant] ten dollars, the costs of this motion, within . . . days from date.

[DATE.]

By the Court: J. K., Judge.

CHAPTER LXXVII.

DISCOVERY OR INSPECTION OF BOOKS, DOCUMENTS, ETC., AND PROOF OF WRITINGS, RECORDS, AND STATUTES.

§ 2277. In general.—"The only provision in the California Code of Civil Procedure, in the nature of a bill of discovery, other than sections 1459 and 1460, applying to probate proceedings is contained in section 1000."[1] The code provides that any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. The section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.[2] The code does not prescribe upon what evidence the order shall be based, whether upon affidavit or oral testimony. The better practice is to base the motion upon affidavits showing that the books, papers, or documents are in the possession of the adverse party, or under his control, and their materiality as evidence, and to serve a copy of the same with the notice. When the order is obtained, a copy of it must also be served, not only for the purpose of laying a foundation for proceedings for contempt, but to notify him what particular books, papers, and documents are required to be inspected and copied. Where an inspection or copy is not desired in advance of the trial, notice may be given the adverse party to produce it; and if he fail to

1 Levy v. Superior Court, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811.

2 Cal. Code Civ. Proc., § 1000. See, also, Cal. Code Civ. Proc., § 1855, subd. 2; Idaho Rev. Codes, § 4875; Mont. Rev. Codes, § 7138; Or. B. & C. Codes, § 533; Utah Rev. Stats., §§ 3401, 3474, 3721, 3984; Wash. Bal. Codes, § 6047; Wyo. Rev. Stats., § 3730.

do so, the writing may then be proved by the party giving the notice, as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party,[3] or where failure to produce the writing is not upon grounds of lack of notice.[4]

§ 2278. **Extent of inspection allowed.**—A party cannot, under this section, have a general inspection of all the books of the opposite party, under ostensible motive of trying to catch something which the other side testifies is not there, by such inspection exposing all private business, dealings with others, his methods of business, and maybe his financial standing, and other like matters of private concern. Such a violation of personal privacy cannot be allowed. The affidavit and order should indicate some particular part of the book or books over which there is suspicion.[5] Inspection cannot be had for the purpose of locating some of defendant stockholders before service of process upon them.[6] The party having possession of the papers may defeat the application for discovery by showing the immateriality of them.[7]

§ 2279. **Physical examination of a party to suit.**—In an action for personal injuries, the court, in absence of legislation, cannot compel plaintiff to submit to a physical examination by physicians appointed by the court.[8]

§ 2280. **Affidavit to prove loss.**—In California, the testimony may be given orally or offered by affidavit. Either course may be adopted, and either course will avail.[9] So proof of loss of an instrument may be by the party's own affidavit, to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question.

3 Cal. Code Civ. Proc., § 1938. New York procedure to procure inspection of books or papers. See Amsinck v. North, 62 How. Pr. 115; New England Iron Co. v. Improvement Co., 55 How. Pr. 351.

4 Harloe v. Lambie, 132 Cal. 133, 64 Pac. 88.

5 Ex parte Clarke, 126 Cal. 235, 77 Am. St. Rep. 176, 58 Pac. 546, 46 L. R. A. 835.

6 Union Col. Co. v. Superior Court, 149 Cal. 790, 87 Pac. 1035.

7 Lawson v. Black Diamond Coal Min. Co., 44 Wash. 26, 86 Pac. 1120.

8 May v. Northern Pac. Ry. Co., 32 Mont. 522, 81 Pac. 328, 70 L. R. A. 111.

9 Bagley v. Eaton, 10 Cal. 126.

But this the party may show by his own oath.[10] An affidavit showing that the surveyor-general has adopted a rule refusing to allow the original to be taken from the files is a sufficient predicate.[11] Substantial showing must be made that the document or book sought for contains material evidence for the party asking; inquisitorial examination was not contemplated by the framers of the statute.[12]

§ 2281. Altered writing.—The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change its meaning or language. If he do that, he may give the writing in evidence, but not otherwise.[13] Where a deed is produced, it is incumbent on the party to establish by satisfactory evidence that the alteration was made by the grantor or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made.[14] A party offering a promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made, or appears to have been made, after the execution of the instrument, and is on a part of the note which is material to the point in dispute.[15] So, on a printed form of note, where the erasure is made only as to the printed matter.[16]

§ 2282. Copies of records as evidence.—Every citizen has a right to inspect and take a copy of any public writing of California, except as otherwise expressly provided by statute.[17] This right extends to matters public, and in which the whole public has an interest,[18] and does not include the instructions from an

10 McCann v. Beach, 2 Cal. 25. See Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27.

11 Hensley v. Tarpey, 7 Cal. 288.

12 Ex parte Clarke, 126 Cal. 235, 77 Am. St. Rep. 176, 58 Pac. 546, 46 L. R. A. 835.

13 Cal. Code Civ. Proc., § 1982.

14 Galland v. Jackman, 26 Cal. 79, 85 Am. Dec. 172; Miller v. Luco, 80 Cal. 257, 22 Pac. 195.

15 Corcoran v. Doll, 32 Cal. 82.

16 Id. See, also, Brooks v. Calderwood, 34 Cal. 564; Wunderlin v. Cadogan, 50 Cal. 613.

17 Cal. Code Civ. Proc., § 1892.

18 Whelan v. Superior Court, 114 Cal. 548, 46 Pac. 468.

attorney to the sheriff regarding the execution of a process.[19] "The public writings" are the laws, judicial records, other official documents, and public records, kept in the state, of private writings.[20] Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing.[21] A public record of a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record.[22] There is no attempt by the statute to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit.[23] To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept.[24] It is well settled that a certified copy of an instrument affecting real property, duly recorded, may be read in evidence, without proof of the original, if it be shown to the satisfaction of the court that the original is not under the control of the party.[25] Alcaldes' records are on a footing with other records kept by the county recorder, and a certified copy of an instrument found therein is admissible under the same circumstances as are certified copies of records made by himself, upon proof of the loss of or inability of the party to produce the original.[26] A sworn copy of exemplification of instruments in the archives of the government is evidence, and the originals ought not to be removed from the government offices.[27] It is not necessary to prove the loss of an original patent before an exemplified copy thereof can be produced in evidence.[28]

19 Galvin v. Palmer, 113 Cal. 46, 45 Pac. 172.

20 Cal. Code Civ. Proc., § 1894.

21 Cal. Code Civ. Proc., § 1893.

22 Cal. Code Civ. Proc., § 1919.

23 Macy v. Goodwin, 6 Cal. 579.

24 Kyburg v. Perkins, 6 Cal. 674.

25 See Cal. Code. Civ. Proc., § 1951; Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Hurlbutt v. Butenop, 27 Cal. 50; McMinn v. O'Connor, 27 Cal. 238; cited in Mayo v. Mazeaux, 38 Cal. 442.

26 Kyburg v. Perkins, 6 Cal. 674; Donner v. Palmer, 31 Cal. 500; Sill v. Reese, 47 Cal. 294; Garwood v. Hastings, 38 Cal. 216; citing Touchard v. Keyes, 21 Cal. 210.

27 Gregory v. McPherson, 13 Cal. 574. As to copy of decree of land commission as evidence, see Young v. Emerson, 18 Cal. 416.

28 Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647.

§ 2283. Foreign state records and laws.—A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing.[29] The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of the decisions of the courts of such state or country, or proved to be commonly admitted in such courts.[30] Where a particular section of the laws of a foreign state is read as evidence, from a printed volume of the statutes of that state, the court, for the purpose of determining what is the law of that state, is not confined to the particular section, but may examine the entire volume.[31]

§ 2284. Foreign record.—A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court or legal keeper of the record, and, in either case, that the signature of such person is genuine, and the attestation in due form; and the signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador of the United States, or of a consul, vice-consul, or consular agent of the United States, in such foreign country.[32] A foreign judicial record should contain pleadings, petitions, or proceedings which led up to the order and gave jurisdiction to make it.[33] Such certificates are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures.[34] So of a certificate of a notary public or United States consul;[35] or notaries and

29 Cal. Code Civ. Proc., § 1901. See Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89. As to statute books of other states published by authority, see Cal. Code Civ. Proc., § 1900.

30 Cal. Code Civ. Proc., § 1902.

31 Ex parte Spears, 88 Cal. 640, 22 Am. St. Rep. 341, 26 Pac. 608.

32 Cal. Code Civ. Proc., § 1906.

33 Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

34 Mott v. Smith, 16 Cal. 533.

35 Id.

consuls of every grade, whether principal or inferior notary, or consul-general, or vice-consul.[36] A copy of the judicial record of a foreign country is also admissible in evidence upon proof: 1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it; 2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and 3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.[37]

§ 2285. Judicial records.—A judicial record of California or of the United States may be proved by the production of the original or a copy thereof, certified by the clerk, or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form.[38]

§ 2286. Printed statutes.—Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof, are admissible in California as evidence of such law.[39]

§ 2287. Seal, impression of.—A seal of a court or public office may be impressed upon wax, wafer, or any other substance, and then attached to the original or a copy thereof, or it may be impressed on the paper alone.[40] A scrawl, with "L. S." written within, is sufficient as a private seal.[41]

36 Mott v. Smith, 16 Cal. 533. See Ely v. Frisbie, 17 Cal. 250.

37 Cal. Code Civ. Proc., § 1907. See Young v. Rosenbaum, 39 Cal. 654; Wickersham v. Johnston, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89.

38 Cal. Code Civ. Proc., § 1905. See, also, U. S. Const., art. 4, § 1; Thompson v. Manrow, 1 Cal. 428; Parke v. Williams, 7 Cal. 249; Low v. Burrows, 12 Cal. 181; Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

39 Cal. Code Civ. Proc., § 1900.

40 See Cal. Code Civ. Proc., § 1931; Connolly v. Goodwin, 5 Cal. 220.

41 Cal. Code Civ. Proc., § 1931. See, as to certified copy of deed, Jones v. Martin, 16 Cal. 166; Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889. See, also, Donner v. Palmer, 31 Cal. 500, and cases there cited.

§ 2288. Secondary evidence—Lost papers.—There shall be no evidence of the contents of a writing other than the writing itself, except—1. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made.[42] Diligent search in all places where the original is likely to be found must be shown, unless it is proved to have been destroyed.[43] The facts and circumstances of the destruction must be shown.[44] So in suit by the assignee of a book-account, the assignor is a competent witness to prove to the court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents.[45] So where the record-book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents.[46] Proof that a notice upon a mining claim has been torn, and that the remaining portion is, as the witness thinks, illegible and defaced, is enough to introduce a copy of it.[47] But a copy of a notice posted on a mining claim, to show its extent, is not admissible in evidence, if the notice itself be attainable.[48] The proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents.[49] The plaintiff's oath that he had never had the deed was held to be insufficient to introduce parol proof of its contents.[50] Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for.[51] To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper unless they are shown to be without the jurisdiction of the court.[52] A copy of a certified copy of an original instrument which has been lost is not admissible in evidence to prove the contents of the

42 Cal. Code Civ. Proc., § 1855, subd. 1.

43 Taylor v. Clark, 49 Cal. 671; People v. Hust, 49 Cal. 653; Alvord v. Spring Valley Gold Co., 106 Cal. 547, 40 Pac. 27; Gillin v. Henkel, 9 Colo. 394, 13 Pac. 420.

44 Bagley v. Admr. of McMickle, 9 Cal. 430.

45 Caulfield v. Sanders, 17 Cal. 569. As to parol evidence to prove contents of instruments destroyed by fire, see Collier v. Corbett, 15 Cal. 183.

46 Ames v. Hoy, 12 Cal. 11.

47 Dunning v. Rankin, 19 Cal. 640.

48 Lombardo v. Ferguson, 15 Cal. 372.

49 Reynolds v. Jourdan, 6 Cal. 108.

50 Lawrence v. Fulton, 19 Cal. 684.

51 Brotherton v. Mart, 6 Cal. 488.

52 Smith v. Brannan, 13 Cal. 107.

original.[53] And a witness who cannot read or write is incompetent to testify to the contents of a lost instrument.[54]

§ 2289. **Proof as to loss of primary evidence.**—In an action on a note, where it is shown that it is lost and cannot be found, it is not error to admit oral evidence of its contents.[55] In a suit to establish a lost deed, evidence that plaintiff had searched for the deed in the last known place of its deposit, and made inquiry of the only person who had access to it, in an endeavor to find it, without success, was sufficient to raise a presumption of its loss, and authorize secondary evidence of its effect.[56] In an action by an assignee of a claim for labor, evidence that the assignment, after execution in writing, had been delivered by plaintiff to his attorney, and left by the latter in the justice's office among the papers in the case, where, after search, it could not be found, was sufficient foundation for secondary evidence of the contents of the instrument.[57] Before the contents of a written bill of particulars can be given in evidence, its absence or loss must be accounted for.[58] Where a card is tacked to a railway-tie, bearing the printed words, "A. & T. Tie Company," and the written words "creosote treated ties," slight evidence of the loss of the card is sufficient to authorize parol proof of its contents, as it was not likely to be preserved.[59] A subpoena on defendant to bring letters into court which were not in his possession is not a ground for introducing secondary evidence.[60] Copies of copies of letters are not admissible as secondary evidence.[61]

§ 2290. **Secondary evidence—Possession of adverse party.**—There shall be no evidence of the contents of a writing other than the writing itself, except—2. Where the original is in possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.[62] An identified copy of a written assignment was admissible where the complaint

53 Dyer v. Hudson, 65 Cal. 372, 4 Pac. 235.

54 Russell v. Brosseau, 65 Cal. 605, 4 Pac. 643.

55 Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946.

56 Kenniff v. Caulfield, 140 Cal. 34, 73 Pac. 803.

57 Everett v. Hart, 20 Colo. App. 93, 77 Pac. 254.

58 Idaho Mercantile Co. v. Kalanquin, 8 Idaho, 101, 66 Pac. 933.

59 Atchison etc. Ry. Co. v. Palmore, 68 Kan. 545, 75 Pac. 509, 64 L. R. A. 90.

60 Jobes v. Lows, 63 Kan. 886, 66 Pac. 627.

61 Id.

62 Cal. Code Civ. Proc., § 1855, subd. 2.

alleged such assignment, and a witness testified that the original was delivered to defendant, and a notice to produce it was proven, and it was not produced.[63] Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear.[64] Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so.[65] Parol proof of a written contract and assignment thereof in writing is not admissible, so as to charge the assignee without notice to produce the original or account for its loss.[66]

§ 2291. **Secondary evidence—Records and public documents.**—There shall be no evidence of the contents of a writing other than the writing itself, except—3. When the original is a record, or other document, in the custody of a public officer.[67] Certified copies of grants made by the surveyor-general of the United States are inadmissible in evidence unless the absence of the original is accounted for.[68] The *expediente,* consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee.[69] Where to a suit for goods sold and delivered defendant pleads his discharge in insolvency, it was held that in support of his plea he can offer in evidence certified copies of the decree, and of each of the papers composing the record of the insolvent proceedings, separately; and that these papers need not all be attached together and the whole certified as one record.[70] Parol testimony of a clerk can be used to prove that no other resolution was passed than the one already in evidence.[71] A witness may be called to summarize testimony, and give results of calculations.[72] Evidence as to declarations of either party are not

63 Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

64 Burke v. Table Mountain etc. Co., 12 Cal. 403.

65 Poole v. Gerrard, 9 Cal. 593.

66 Grimes v. Fall, 15 Cal. 63. See Jones v. Jones, 38 Cal. 586.

67 Cal. Code Civ. Proc., § 1855, subd. 3.

68 Hensley v. Tarpey, 7 Cal. 288. But see Natoma Water etc. Co. v. Clarkin, 14 Cal. 544. See Brown v. Griffith, 70 Cal. 14, 11 Pac. 500; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861.

69 Gregory v. McPherson, 13 Cal. 562.

70 Goldstone v. Davidson, 18 Cal. 41.

71 Pacific Pav. Co. v. Gallett, 137 Cal. 174, 69 Pac. 985.

72 Wilson v. Alcatraz etc. Co., 142 Cal. 182, 75 Pac. 787.

admissible, even where the document is lost; only the contents of the writing can be testified to.[73]

§ 2292. Secondary evidence—Made by statute.—There shall be no evidence of the contents of a writing other than the writing itself, except—4. When the original has been recorded, and a certified copy of the record is made evidence by the Code of Civil Procedure or other statute.[74] But it does not dispense with the production of the originals, if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original.[75] A recorder need not transcribe the notarial seal to the acknowledgment of a deed where the certificate states that the seal was affixed.[76] A power of attorney not affecting real estate is not required to be recorded, and the fact that it acknowledges land recorded does not dispense with proof of its execution.[77] A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not in his power or control;[78] or that it is lost.[79] Before the contents of a written bill of particulars can be given in evidence, its absence or loss must be accounted for.[80] A United States patent for land may be proved by producing from the recorder's office the book in which it is recorded, without proof of the loss of the original.[81]

§ 2293. Secondary evidence—Numerous accounts.—There shall be no evidence of the contents of a writing other than the writing itself, except—5. When the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is

73 Nicholson v. Tarpey, 124 Cal. 442, 57 Pac. 457.

74 Cal. Code Civ. Proc., § 1855, subd. 4; McMinn v. O'Connor, 27 Cal. 238. The act of 1851, section 21, gives to papers properly recorded the like effect as originals, but it does not dispense with proof of execution. Powell's Heirs v. Hendricks, 3 Cal. 427. But that this statute is changed, see Cal. Code Civ. Proc., § 1951.

75 Macy v. Goodwin, 6 Cal. 579; McMinn v. O'Connor, 27 Cal. 238.

76 Jones v. Martin, 16 Cal. 165.

77 Stevens v. Irwin, 12 Cal. 306.

78 Hurlbutt v. Butenop, 27 Cal. 50.

79 Hicks v. Coleman, 25 Cal. 129, 85 Am. Dec. 103.

80 Idaho Mercantile Co. v. Kalanquin, 8 Idaho, 101, 66 Pac. 933.

81 Vance v. Kohlberg, 50 Cal. 346; Eltzroth v. Ryan, 89 Cal. 135, 26 Pac. 647.

only the general result of the whole.[82] In cases mentioned in subdivisions 3 and 4 of section 1855 of the California Code of Civil Procedure, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents. This section is limited to proof of the contents of the writing. A witness may be called in to summarize the testimony for the court and jury.[83] The fact of the making of the writing may be proved by parol.[84] The acts of a corporation by its board of directors may be proved by parol, where by mistake they were not entered on the minutes.[85]

§ 2294. Notice of motion for order of inspection, etc., of books, documents, etc.

Form No. 614.

[TITLE.]

To C. D., defendant in said action:

Sir: You are hereby notified that the plaintiff herein will, on the . . . day of . . ., 19. . , at ten o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court, in the city hall at . . . , in said county, move the court for an order that you give to this plaintiff an inspection and copy of [describe book, document, or paper], in your possession [or, under your control], containing evidence relating to the merits of this action. Said motion will be based and heard upon the affidavit of . . . , a copy of which is hereto attached and herewith served, and the files and records of said court in said cause.

E. F., Attorney for Plaintiff.

§ 2295. Notice to produce papers, etc., on trial.

Form No. 615.

[TITLE.]

To . . . , defendant [or, plaintiff]:

You are hereby notified to produce upon the trial of the above-entitled cause [a certain contract in writing made between A. B. and C. D., on or about the . . . day of . . ., 19. . , relating to the sale of the premises described in the complaint herein], and if you fail to do so secondary evidence of its contents will be given.

E. F., Attorney for Plaintiff [or, Defendant].

82 Cal. Code Civ. Proc., § 1855, subd. 5.

83 Wilson v. Alcatraz etc. Co., 142 Cal. 182, 75 Pac. 787.

84 Poole v. Gerrard, 9 Cal. 594; Sais v. Sais, 49 Cal. 264.

85 Bay View Homestead Assoc. v. Williams, 50 Cal. 353.

CHAPTER LXXVIII.

ITEMS OF ACCOUNT.

§ 2296. Demand for items.—Within five days after a demand thereof in writing a copy of the account shall be delivered to the adverse party, or evidence thereof cannot be given, and if too general or defective, a further account may be ordered.[1] An account includes almost every claim on a contract which consists of several items,[2] but a complaint for money due for the use and occupation of land does not present a claim upon which a bill of particulars can be required,[3] likewise, in an action to recover money intrusted to another for safe keeping.[4] The bill of particulars is an amplification of the complaint, and limits proof to the items set out.[5]

§ 2297. Items set forth.—The items of the account furnished must be set forth with as much particularity as the nature of the case admits of.[6] A bill of particulars is sufficiently specific if it apprises the opposite party of the evidence to be offered.[7] If the bill is too general, the party receiving it should obtain an order for further particulars. If he does not, he cannot proceed as if no bill was rendered.[8] Where a party has obtained a further bill of particulars under an order of the court, if he intends to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence.[9]

§ 2298. What need not be set forth.—A party is not bound to furnish particulars of set-offs with which he volunteers to credit the opposite party;[10] nor when a knowledge of the facts

1 Cal. Code Civ. Proc., § 454. See also, Scott v. Frost, 4 Colo. App. 557, 36 Pac. 910.

2 Long Beach v. Dodge, 135 Cal. 401, 67 Pac. 499.

3 Moore v. Bates, 46 Cal. 29.

4 Lacey v. Bentley, 39 Colo. 449, 89 Pac. 789.

5 Edelman v. McDonell, 126 Cal. 210, 58 Pac. 528; Blackburn v. Washington Gold Min. Co., 19 Wash. 361, 53 Pac. 369.

6 Bagley's Pr. 204; Conner v. Hutchinson, 17 Cal. 280; Kellogg v. Paine, 8 How. Pr. 329.

7 Smith v. Hicks, 5 Wend. 48.

8 Providence Tool Co. v. Prader, 32 Cal. 634, 91 Am. Dec. 598.

9 Conner v. Hutchinson, 17 Cal. 279.

10 Williams v. Shaw, 4 Abb. Pr. 209; Giles v. Betz, 15 Abb. Pr. 285.

on which a party's claim rests is more with the defendant than the plaintiff.[11] The plaintiff need not disclose by the bill any specific evidence on which he relies.[12] Where the complaint *in hæc verba* set forth the bill of sale, it was held to remedy a defect in the allegation of the quantity of goods sold. A party must be presumed to know what was intended by his own account.[13] It is not necessary to furnish a bill of particulars where suit is upon an account stated.[14]

§ 2299. Order.—An order of the court for a further account should specify the particulars in reference to which a further specification is required.[15] It is a matter resting largely in the discretion of the trial court whether a bill of particulars should or should not be ordered in a particular case.[16] If the defendant has the means for ascertaining the items, there is no reason for ordering plaintiff to furnish it to him.[17]

§ 2300. Bill of particulars.—A bill of particulars is not a part of the record proper, and the appellate court cannot take notice that a paper certified in the transcript as a bill of particulars was the bill in controversy at the trial, nor that some other or further bill was not furnished in due time.[18] In an action for legal services rendered, the bill of particulars may enumerate the services without placing an exact value upon each, if it sufficiently notifies the defendant of the nature of the charge, and an amended bill may properly include charges omitted from a former bill.[19] A bill of particulars cannot properly be required in a quiet-title suit, where the claims are evidenced by written recorded instruments.[20] If plaintiff does not rely upon the statute for the short form of complaint on account, by merely setting out the account, but, on the contrary, attaches copy of

11 Young v. De Mott, 1 Barb. 30.

12 Blackburn v. Washington Gold Min. Co., 19 Wash. 361, 53 Pac. 369; Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34.

13 Cochran v. Goodman, 3 Cal. 244.

14 Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371.

15 Conner v. Hutchinson, 17 Cal. 280; Kellogg v. Paine, 8 How. Pr. 329. As to sufficiency of bill of particulars, see Isham v. Parker, 3 Wash. 755, 29 Pac. 835.

16 Ferry v. King County, 2 Wash. 337, 26 Pac. 537; Rayburn v. Hurd, 20 Or. 229, 25 Pac. 635.

17 Ferry v. King County, 2 Wash. 337, 26 Pac. 537.

18 Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817.

19 Moore v. Scharnikow, 48 Wash. 564, 94 Pac. 117; Ames v. Bell, 5 Cal. App. 1, 89 Pac. 619.

20 Boyer v. Robison, 43 Wash. 97, 86 Pac. 385.

such account to his petition as an exhibit, he must expressly make it a part of the petition.[21]

§ 2301. Order for an inspection, etc., of books.—In California, any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession or under his control, containing evidence relating to the merits of the action, or to the defense therein. If compliance with the order be refused, the entries, documents, or paper may be excluded as evidence; or if wanted as evidence by the party applying, the court may direct the jury to presume them to be such as he alleges them to be; and punish the party refusing for contempt.[22]

§ 2302. Service.—The bill of particulars itself, and not a copy thereof, must be delivered to the adverse party.[23] Where the bill is delivered after the statutory time allowed, but long prior to the time of trial, defendant is not injured thereby, and it is not error for the court to admit the evidence thereon.[24] The filing of the bill is not required or expressly authorized in California.[25]

§ 2303. Effect of motion.—The filing of a motion for a bill of particulars, *ipso facto*, extends the time for answering.[26] Failure to file the bill after demand renders it error to receive evidence of any items of account,[27] but does not preclude testimony upon other claims made in the complaint other than the account.[28] The demand for a bill of particulars cannot properly be made by motion to make the complaint more specific.[29]

21 Board of Comrs. v. Denebrink, 15 Wyo. 342, 89 Pac. 7, 9 L. R. A. (N. S.) 1234.

22 Cal. Code Civ. Proc., § 1000. See, also, Idaho Rev. Codes, § 4875; Mont. Code Civ. Proc., § 7138; Nev. Comp. Laws, § 3521; Or. B. & C. Codes, § 533; Utah Rev. Stats., §§ 3401, 3474, 3721, 3984; Wash. Bal. Codes, § 6047; Wyo. Rev. Stats., § 3730.

23 Edelman v. McDonnell, 126 Cal. 210, 58 Pac. 528.

24 McCarthy v. Mt. Tecarte L. & W. Co., 110 Cal. 687, 43 Pac. 391.

25 Edelman v. McDonnell, 126 Cal. 210, 58 Pac. 528.

26 Plummer v. Weil, 15 Wash. 427, 46 Pac. 648.

27 Scott v. Frost, 4 Colo. App. 557, 36 Pac. 910; Nelson v. Twin Falls L. & W. Co., 14 Idaho, 5, 93 Pac. 789.

28 Flynn v. Seale, 2 Cal. App. 665, 84 Pac. 263.

29 Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058.

FORMS—ITEMS OF ACCOUNT.

§ 2304. Demand for bill of items.

Form No. 616.

[TITLE.]

To E. F., Attorney for Plaintiff:

Please take notice, that the defendant hereby demands a bill of the particular items of the account mentioned in the complaint of plaintiff herein.

[DATE.] [SIGNATURE.]

§ 2305. Copy of account.

Form No. 617.

[TITLE.]

[Here set forth the account referred to in the pleading.]

To . . ., attorney:

Please take notice that the above is a copy of the account demanded by you [or, referred to in the complaint or answer] in this action.

[DATE.] [SIGNATURE.]

§ 2306. Affidavit to obtain further bill of particulars.

Form No. 618.

[TITLE.]

[VENUE.]

C. D., being first duly sworn, says:

That he is the defendant in this action, and that on the . . . day of . . .; 19.., the plaintiff, upon defendant's demand [or, upon an order so requiring], served on the defendant's attorney herein a copy of the account mentioned in his complaint [or, a bill of particulars of the plaintiff's demand on which this action is brought], which copy so served is hereto annexed; [or is on file].

That the same is so defective, indefinite, and insufficient that the defendant is unable to answer the same [or, to go to trial thereon], in that it fails to state the dates of the several items of the account [or otherwise specify the defects], and that a further and more specific account [or, bill of particulars] is

absolutely necessary in order to enable the defendant to prepare his answer and prepare for trial for the following reasons: [Here state reasons.]

[JURAT.] C. D.

§ 2307. Order for a further bill of particulars.

Form No. 619.

[TITLE.]

On good cause shown, let the plaintiff's attorney deliver to the defendant's attorney a further account in writing of the particulars of the plaintiff's demand for which this action is brought, within . . . days, specifying the dates of the said several items [or other matters in which the bill is deficient].

[DATE.] [SIGNATURE.]

§ 2308. Order precluding plaintiff from giving evidence of account.

Form No. 620.

[TITLE.]

The motion of the defendant for an order precluding the plaintiff from giving evidence of certain matters therein specified, coming on to be heard:

On reading and filing the affidavit of L. M. herein, and on the pleadings and [here state other papers used in the motion], and after hearing G. H., attorney for the [defendant], for the motion, and E. F., [plaintiff's] attorney, in opposition, and being advised in the premises:

Ordered, that upon the trial of this action the plaintiff be precluded from giving evidence of, or in support of, the matters of which he has failed to furnish a [further] sufficient account [or, bill of particulars] as required herein, to-wit:

[Here specify the matters precluded], and that the plaintiff have ten dollars, the costs of this motion.

By the Court: L. M., Judge.

CHAPTER LXXIX.

ARBITRATIONS AND AWARDS.

§ 2309. Award conclusive.—An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive.[1] The award of money is absolute and unconditional, but the award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release without the tender of a release by himself.[2] Where parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award.[3] An award is void which is not final and conclusive, and does not embrace all the matter submitted.[4] If the submission limits the time for filing the award, an award filed after that time is void.[5] It is the duty of the parties, and not of the arbitrators, to file the award if it is desired to be filed.[6]

§ 2310. Duty of arbitrators.—It is the duty of arbitrators to pass upon the whole subject in controversy; and if it appears on the face of the award that they have not disposed of the whole matter, or if the terms of the award render a further inquiry necessary to ascertain a sum to be paid or an act to be done, it is void.[7]

§ 2311. Hearing.—Each party to an arbitration is entitled to an opportunity to be heard in the presence of the other, and to

1 Jarvis v. Fountain Water Co., 5 Cal. 179. See, also, as to conclusiveness of award, Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92; Robinson v. Templar Lodge, 97 Cal. 62, 31 Pac. 609; Garrow v. Nicolai, 24 Or. 76, 32 Pac. 1036; Bachelder v. Wallace, 1 Wash. T. 107; Thornton v. McCormick, 75 Iowa, 285, 39 N. W. 502; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276.

2 Dudley v. Thomas, 23 Cal. 365.

3 Montifiori v. Engels, 3 Cal. 431.

4 Talbott v. Hartley, 1 Cranch C. C. 31, Fed. Cas. No. 13732; Colcord v. Fletcher, 50 Me. 398; McCrary v. Harrison, 36 Ala. 577.

5 Abrams v. Brennan, 2 Cal. App. 237, 84 Pac. 363.

6 Richards v. Smith, 33 Utah, 8, 91 Pac. 683.

7 Porter v. Scott, 7 Cal. 312.

have reasonable time to produce witnesses and examine them.[8] Books of account not properly kept, not actually offered in evidence, and not material, need not be inspected by the arbitrators.[9] An award is invalid and void unless both of the parties have notice of the time and place of the meeting of the arbitrators, and an opportunity to be heard.[10]

§ 2312. **Agreement to arbitrate.**—Upon an agreement having been made to arbitrate all disputes of a certain nature, a party thereto cannot maintain an action where he has not offered to arbitrate, and has refused to do so on notice from the other party.[11]

§ 2313. **Invalid awards.**—An award, to be valid, must be certain and decisive as to the matters submitted, and thus avoid all further litigation.[12] A useless and invalid determination upon one item properly presented within the general terms of the submission must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional or unintentional, to notice the item at all.[13] If an award, though not good under the statute, is valid as a common-law award, the court may refuse a motion to set it aside.[14] But the making of a new and supplementary paper, and attaching the same to the award after it has been delivered, does not vitiate the original award, and may be treated as surplusage.[15] An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision.[16] An award bad in part may be enforced for the part that is good, if not attacked for fraud, and the matter is divisible.[17]

§ 2314. **Jurisdiction.**—Where it is stipulated that the submission be made an order of court, it must be of some court hav-

8 Morewood v. Jewett, 2 Robt. 496.

9 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

10 Curtis v. City of Sacramento, 64 Cal. 102, 28 Pac. 108. See California etc. M. E. Church v. Seitz, 74 Cal. 287, 15 Pac. 839.

11 Zindorf Const. Co. v. Western Am. Co., 27 Wash. 31, 67 Pac. 374; Winsor v. German Savings etc. Soc., 31 Wash. 365, 72 Pac. 66.

12 Jacob v. Ketcham, 37 Cal. 197. See Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92.

13 Muldrow v. Norris, 12 Cal. 331.

14 Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

15 Dudley v. Thomas, 23 Cal. 365.

16 Walker v. Walker, 1 Winst. (N. C.) 259.

17 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313; Parmelee v. Allen, 32 Conn. 115; White v. Arthur, 59 Cal. 33. For instance of an award

ing jurisdiction of the subject-matter of the controversy; otherwise, it is void *in toto*, and the arbitrators have no power under it.[18] If it appear that the intention was to make the award only a rule of court, the court has no jurisdiction.[19] It does not follow that because a matter in difference between parties may be submitted by them to arbitration, that a court of record, or any other court, will thereby acquire jurisdiction of the subject-matter in controversy or of the parties litigant, unless the agreement further stipulate that the submission and stipulation are filed with the clerk, and the clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the Practice Act.[20] In order to give the court jurisdiction, there must be a stipulation that the submission be entered as an order of court, and the clerk must make the proper entries in the register.[21]

§ 2315. Judgment on award.—Where a submission to arbitration is made an order of court under the Practice Act, the clerk may enter judgment on the award, in due time, without any further order of the court.[22] A judgment entered upon an award not supported by a valid statutory agreement of submission to arbitration is absolutely void, and may be set aside by the court with or without a motion therefor, and execution thereof may be perpetually stayed.[23] The report of a referee and the award of an arbitrator are in all essentials the same.[24] And a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in court as a matter of course.[25] After the

not void for uncertainty, see Carsley v. Lindsay, 14 Cal. 390.

18 Williams v. Walton, 9 Cal. 142.

19 Fairchild v. Doten, 42 Cal. 125.

20 Cal. Code Civ. Proc., § 1283; Kettleman v. Treadway, 65 Cal. 505, 4 Pac. 506; Ryan v. Dougherty, 30 Cal. 218. Practice as to award of arbitrators stated in Tacoma etc. Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

21 Pieratt v. Kennedy, 43 Cal. 393. As to amendment of entry of submission, see California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855. That submission of a cause to arbitration, made pending an action thereon, operates as a discontinuance of the action, see Draghicevich v. Vulicevich, 76 Cal. 378, 18 Pac. 406.

22 Carsley v. Lindsay, 14 Cal. 390; overruling Heslep v. City of San Francisco, 4 Cal. 1.

23 Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740.

24 Grayson v. Guild, 4 Cal. 122. As to power of the court to modify or correct the award on motion, see Cal. Code Civ. Proc., § 1288.

25 Gunter v. Sanchez, 1 Cal. 45.

expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment-book, and thereupon it has the effect of a judgment.[26] It is the duty of the party desiring judgment on the award to file the same, and not the duty of the arbitrators.[27] If a judgment on an award is entered by the clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party cannot afterwards question its validity on the ground that it was irregularly entered.[28] Failure to file a submission in court before the hearing merely allows the parties to revoke it, and does not affect the right of arbitrators to proceed to a hearing.[29]

§ 2316. **Matters submitted.**—The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid.[30] If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission.[31] Colorado provides a state board of arbitrators for labor disputes.[32] In South Dakota, an agreement to arbitrate cannot be enforced,[32a] while in Oregon such agreements are limited to fencing removed by floods.[33]

§ 2317. **Must be in writing.**—The submission must be in writing, and may be to one or more persons, and may be to settle

26 Cal. Code Civ. Proc., § 1286.
27 Richards v. Smith, 33 Utah, 8, 91 Pac. 683.
28 Hoogs v. Morse, 31 Cal. 128.
29 Richards v. Smith, 33 Utah, 8, 91 Pac. 683.
30 Jensen v. Deep Creek Farm, 27 Utah, 66, 74 Pac. 427.
31 Muldrow v. Norris, 12 Cal. 331; Richards v. Smith, 33 Utah, 8, 91 Pac. 683.
32 Colo. Mills' Stats., §§ 2801a-2801q; Mont. Rev. Codes., §§ 1670-1678.
32a S. Dak. C. C., § 2344.
33 Or. B. & C. Codes, §§ 3883-3886.

any controversy which may be the subject of a civil action.[34] The award also must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. And when the submission is made an order of court, the award must be filed with the clerk.[35]

§ 2318. **Objections to award.**—Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained.[36] If the party in whose favor an award of arbitrators is made voluntarily takes judgment on the award, and then receives the amount of the judgment in satisfaction of it, this is a waiver of any errors or misconduct on the part of the arbitrators.[37] If the parties upon the trial before the arbitrators submit by mutual consent matters not included in the written submission, and the arbitrators try such matters, neither party, after publication of the award, can object that the award exceeded the submission.[38]

§ 2319. **Organization.**—All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they must be sworn, before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.[39] The proceedings need not follow any technical rule and formality, if honestly and fairly conducted.[40]

§ 2320. **Power of arbitrators.**—Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and

34 Cal. Code Civ. Proc., § 1282. See, also, Idaho Rev. Codes, §§ 5260-5269; Mont. Rev. Codes, §§ 7365-7374; Nev. Comp. Laws, §§ 3457-3470; Utah Rev. Stats., §§ 3221-3231; Wash. Bal. Codes, §§ 5102-5108; N. Mex. Comp. Laws, §§ 3006-3013; Ariz. Civ. Code, pars. 295, 309; Wyo. Rev. Stats., §§ 4068-4080.

35 Cal. Code Civ. Proc., § 1286.

36 See Blair v. Wallace, 21 Cal. 317.

37 Hoogs v. Morse, 31 Cal. 128.

38 Woods v. Page, 37 Vt. 252.

39 Cal. Code Civ. Proc., § 1285.

40 Carlston v. St. Paul F. & M. Ins. Co., 37 Mont. 118, 127 Am. St. Rep. 715, 94 Pac. 756.

evidence of the parties, and to make an award thereon,[41] and to award costs.[42] The arbitrator must make his award within the time limited in the agreement, or both the arbitrator and court lose jurisdiction of the case, unless the parties stipulate in writing to extend the time;[43] and, even though it is not essential to the validity of the arbitration agreement, that it should limit the time of filing the award.[44] Arbitrators have power to determine both the validity and amount of the claim in dispute.[45] And after an award has been once made and delivered the arbitrators cannot alter the same, even to correct mistakes, without the consent of the parties.[46] They have no common-law powers when appointed under the statute.[47]

§ 2321. Principles of determination.—Arbitrators, under a general submission, are not bound to decide according to strict law, but rather according to equity.[48] However, where they intend to decide according to law, a mistake apparent on the face of the award is fatal.[49] If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law.[50] However, they are not required to find facts or give reasons.[51]

§ 2322. Setting aside award.—Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident. An award may be set aside for a mistake of law, when it appears on the face of the award.[52] Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside.[53] If the arbitrator rules upon questions of law, and refers the whole matter to the court for revision, and

41 Cal. Code Civ. Proc., § 1284.

42 Dudley v. Thomas, 23 Cal. 365; Jones v. Carter, 8 Allen, 431.

43 Ryan v. Dougherty, 30 Cal. 218.

44 In re Abrams, 2 Cal. App. 237, 84 Pac. 363; Jordan v. Lobe, 34 Wash. 42, 74 Pac. 817.

45 Colcord v. Fletcher, 50 Me. 398. See Simons v. Mills, 80 Cal. 118, 22 Pac. 25; Springer v. Schultz, 64 Cal. 454, 2 Pac. 32; Fulmore v. McGeorge, 91 Cal. 611, 28 Pac. 92.

46 Russ. Arb. 135; Porter v. Scott, 7 Cal. 312; Dudley v. Thomas, 23 Cal. 365.

47 Williams v. Walton, 9 Cal. 145; Bayne v. Morris, 1 Wall. 97, 17 L. Ed. 495; Talbott v. Hartley, 1 Cranch C. C. 31, Fed. Cas. No. 13732.

48 In matter of Connor, 128 Cal. 279, 60 Pac. 862.

49 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

50 Id.

51 In matter of Connor, 128 Cal. 279, 60 Pac. 862.

52 Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313.

53 Pierson v. Norman, 2 Cal. 599.

it is found that he mistook the law, his report will be set aside;[54] or if the arbitrators exceeded their powers, or refused or improperly omitted to consider a part of the matter submitted to them;[55] but such error or misconduct must be such as to prejudice the rights of the party complaining thereof.[56] That the arbitrator did not act upon all the items or property of a partnership is no ground for vacating his award. Certainly not, if the facts were not brought before him.[57]

§ 2323. Revocation.—An agreement to submit matter to arbitration is, both at law and in equity, revocable before the award is given,[58] and it cannot be made irrevocable by agreement of parties;[59] otherwise, it seems, of a submission by rule of court.[60] When entered as an order of court, the submission cannot be revoked without the consent of both parties;[61] otherwise, it may be revoked at any time before the award is made.[62]

§ 2324. Ratification or impeachment of award.—Equity will set aside an award based on fraud or false testimony.[63] The court may pass upon objections raised, regardless of whether the award was brought into the case either as a common-law or as a statutory one.[64] If the award is divisible, acceptance of a part of it is no estoppel from questioning the other part.[65]

§ 2325. Submission in particular cases.—One partner cannot bind his copartner by a submission of partnership matters to arbitration;[66] but such a submission would be good against the

54 Cushman v. Wooster, 45 N. H. 410; Pulliam v. Pensoneau, 33 Ill. 375.

55 Cal. Code Civ. Proc., § 1287.

56 Manson v. Wilcox, 140 Cal. 206, 73 Pac. 1004.

57 Carsley v. Lindsay, 14 Cal. 390. See Valle v. Northern Missouri R. R. Co., 37 Mo. 445. See, as to grounds of setting aside an award, Cal. Code Civ. Proc., § 1287. When award not binding upon the parties, see Stockton etc. Agricultural Works v. Glen Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

58 Clapham v. Higham, 7 East, 607, 1 Bing. 89.

59 Tobey v. County of Bristol, 3 Story C. C. 800, Fed. Cas. No. 14065.

60 Masterson v. Kidwell, 2 Cranch C. C. 669, Fed. Cas. No. 9269; Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. 932.

61 Cal. Code Civ. Proc., § 1283.

62 Id. See California Academy of Sciences v. Fletcher, 99 Cal. 207, 33 Pac. 855; Church v. Shanklin, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207.

63 Fire Ins. Co. v. Allesina, 49 Or. 316, 89 Pac. 960; Wyo. Rev. Stats., 1899, § 4078; Cohn v. Wemme, 47 Or. 146, 81 Pac. 981.

64 Waisner v. Waisner, 15 Wyo. 420, 123 Am. St. Rep. 1081, 89 Pac. 580.

65 Id.

66 Karthaus v. Ferrer, 1 Pet. 222, 7 L. Ed. 121.

partner agreeing to it.[67] Whenever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement.[68] When an agreement in writing is entered into, under the Practice Act,[69] to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a court of equity will decree a specific performance of the award,[70] even though the party refusing to perform should agree to pay the penalty agreed on.[71] If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional and the award binding only in case the arbitrators pass upon every subject either specially referred to them or brought to their notice under the general terms of the submission.[72] An action for the recovery of mining ground on public land is regarded as a "question of title to real property," and therefore cannot properly be submitted to arbitration.[73]

§ 2326. **Umpire.**—When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators.[74] An umpire is not to be called in until the original arbitrators have differed, and then only to decide the points on which they differ.[75] An umpire must hear the parties. His award made on the statement of the arbitrators is not binding.[76] And he must give notice of the time and place of his proceeding.[77]

67 Jones v. Bailey, 5 Cal. 345.
68 Blair v. Wallace, 21 Cal. 317.
69 Cal. Code Civ. Proc., § 1281.
70 Whitney v. Stone, 23 Cal. 275.
71 Id.
72 Muldrow v. Norris, 12 Cal. 331.
73 Spencer v. Winselman, 42 Cal. 479; Cal. Code Civ. Proc., § 1281.
74 Dudley v. Thomas, 23 Cal. 365.
75 Traverse v. Beall, 2 Cranch C. C. 113, Fed. Cas. No. 14153; Fish v. Vermillion, 70 Kan. 348, 78 Pac. 811.
76 Taber v. Jenny, Sprague, 315, Fed. Cas. No. 13720.
77 Thornton v. Chapman, 2 Cranch C. C. 244, Fed. Cas. No. 13997.

§ 2327. Who may submit to arbitration.—Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.[78] An attorney at law, as such, has authority to refer to arbitration a suit in which he is employed.[79]

FORMS IN ARBITRATION AND AWARD.

§ 2328. Agreement of general submission to arbitration—Short form.

Form No. 621.

[TITLE.]

We, the undersigned, mutually agree to submit, and do hereby submit, all our matters in difference, of every name or nature, to the award and decision of P. Q., R. S., and T. U., for them to hear and determine the same, and make their award in writing, on or before the . . . day of . . . next.

Witness our hands, this . . . day of . . ., 19..

[SIGNATURES AND SEALS.]

§ 2329. Agreement of special submission to arbitration.

Form No. 622.

[TITLE.]

Whereas, a controversy is now existing and pending between A. B., of, etc., and C. D., of, etc., in relation to certain mining claims and quartz-mills, under a contract made by and between the said parties, at the town of . . . aforesaid, on the . . . day of . . . last past:

Now, therefore, we, the undersigned, A. B. and C. D., aforesaid, do hereby submit the said controversy to the arbitrament of P. Q., R. S., and T. U., of, etc., or any two of them; and we do mutually covenant and agree, to and with each other, that the

78 Cal. Code Civ. Proc., § 1281; Higgins v. Kinneady, 20 Iowa, 474; Ryan v. Dougherty, 30 Cal. 218.

79 Holker v. Parker, 7 Cranch, 436, 3 L. Ed. 396; Alexandria Canal Co. v. Swann, 5 How. 83, 12 L. Ed. 60. See Green v. Darling, 5 Mason, 201, Fed. Cas. No. 5765. As to where agent submitted to arbitration question of damage done to land owned by wife of his principal, see Smith v. Sweeney, 35 N. Y. 291.

award to be made by the said arbitrators, or any two of them, shall in all things, by us and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing, under the hands of the said P. Q., R. S., and T. U., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on the . . . day of . . . next.

And it is hereby further stipulated and agreed by and between the said A. B. and C. D., the parties to said controversy, that this submission to arbitration of the controversy herein named shall be entered as an order of the superior court of the state of California, in and for the county of . . .

Witness our hands, etc.

[SIGNATURES AND SEALS.]

§ 2330. Common-law agreement of arbitration, submitting all demands.

Form No. 623.

Whereas, certain controversies now exist between the undersigned A. B., of . . ., and C. D., of . . . :

Now, therefore, it is hereby agreed, that the said controversies, and all of them, be and they are hereby submitted to E. F., of . . ., and G. H., of . . ., as arbitrators, the said arbitrators to hear and determine the same and make their award in writing on or before the . . . day of . . ., 19..

Witness our hands, this . . . day of . . ., 19.... A. B.
C. D.

In presence of:
J. K.

§ 2331. Arbitration agreement, providing for appointment of a third arbitrator.

Form No. 624.

This agreement, made this . . . day of . . ., 19.., between A. B., of . . ., and C. D., of . . ., witnesseth:

That, whereas, certain differences and controversies now exist between the said A. B. and C. D., in order that the same may be finally settled and determined, we, the said A. B. and C. D., do hereby agree that all differences and controversies now existing between us of every kind and nature which might be the subject

of a civil action be and the same are hereby submitted to the award and determination of E. F. and G. H., and of such third person as the said E. F. and G. H. shall, by writing, under their hands, and to be indorsed upon this agreement, appoint to act with them as arbitrators, who shall have full power and authority to hear and determine the said controversies, claims, and demands, and shall make their award thereon in writing on or before the . . . day of . . ., 19.. ; and it is further agreed that judgment may and shall be rendered upon the award so made by the . . . court of . . . county, state of . . .

It is further agreed, that said arbitrators shall each receive the sum of . . . dollars per day for his fees and expenses in the matter of this arbitration, the same to be taxed and allowed by the court as part of the costs of said arbitration.

A. B.

[ACKNOWLEDGMENT.] C. D.

§ 2332. Agreement to determine partnership disputes by arbitration.

Form No. 625.

This agreement, made and entered into this . . . day of . . ., 19.. , between A. L., of the first part, F. H., of the second part, and G. F., of the third part, all of the city of . . ., county of . . .

Whereas, the said parties of the first and second parts were, for a long time prior to the . . . day of . . ., 19.. , engaged and concerned together as copartners, which partnership was dissolved;

And whereas, for the purpose of compromising, finally ending, and absolutely determining all differences, controversies, actions, suits, debts, accounts, and demands whatsoever, had, made, moved, depending, arising, or accruing, or which at any time or times may be had by or between said parties of the first and second parts, for or by reason or means of the accounts of said copartnership, or of any matter or thing relating thereto, resulting therefrom, or otherwise howsoever, it has been covenanted by said parties to refer all such differences of accounts to the said party of the third part for arbitration and adjustment, and the said party of the third part has consented to become such arbitrator:

Now, this agreement witnesseth, that the said parties of the first and second parts do hereby mutually covenant and agree, to

and with each other, that the said party of the third part shall arbitrate, award, order, judge, and determine of and concerning all and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever relating to or growing out of their copartnership account, prior to the . . . day of . . ., 19.., and shall conclude such arbitration, and make award, and deliver the same to either of said parties of the first or second part in three months from this day; and said parties of the first and second parts mutually agree to abide by the said award in all things.

§ 2333. Stipulation of parties extending the time.

Form No. 626.

The within named A. B. and C. D., for ourselves and each of our heirs, executors, and administrators, do hereby agree that the within named arbitrators shall have further time for making their award of and concerning the matters referred to them in this agreement, until the . . . day of . . ., 19..

Witness our hands, this . . . day of . . .,19.. A. B.

Witness: C. D.

E. F.

[This stipulation should be indorsed upon the original agreement.]

§ 2334. Oath of arbitrators.

Form No. 627.

In the Matter of the Arbitration of Differences between A. B. and C. D.

[VENUE.]

E. F. and G. H., the arbitrators appointed by the said A. B. and C. D. in the above-entitled matter, being each duly sworn, each for himself says: That he will faithfully hear and examine the matters in controversy submitted to him by the said A. B. and C. D. in their agreement of arbitration, and will make a just award thereon according to the best of his understanding.

E. F.

G. H.

Subscribed and sworn to before me, this . . . day of . . ., 19..

I. K., Notary Public.

§ 2335. Notice of first meeting of arbitrators.

Form No. 628.

In the Matter of the Arbitration of Differences between A. B. and C. D.

We, the undersigned arbitrators appointed by the said A. B. and C. D. in their agreement in writing dated on the . . . day of . . ., 19.., do hereby appoint the . . . day of . . ., 19.., for proceeding to hear and decide the matters in difference between the said A. B. and C. D., at the hour of . . . o'clock, in the city of . . ., state of . . .

E. F.,
G. H.,
Arbitrators.

To Messrs. A. B. and C. D.

§ 2336. Revocation of arbitration agreement.

Form No. 629.

In the Matter of the Arbitration of Differences between A. B. and C. D.

To E. F. and G. H., Arbitrators:

Please take notice that we hereby revoke your power as arbitrators under the submission made to you by us in writing dated the . . . day of . . ., 19..

Dated . . ., 19..

A. B.
C. D.

§ 2337. Release to be executed by party to an arbitration, when required in the award.

Form No. 630.

Know all men by these presents, that I, A. B., of the . . . county of . . ., for and in consideration of the sum of one dollar, to me in hand paid by C. D., of . . ., and in pursuance of an award made by P. Q., R. S., and T. U., arbitrators between us, the said A. B. and C. D., and bearing date the . . . day of . . ., 19.., do hereby release and forever discharge the said C. D., his heirs, executors, and administrators, of and from all actions, cause and causes of action, suits, controversies, claims, and demands what-

soever, for or by reason of any matter, cause, or thing, from the beginning of the world down to the . . . day of . . ., 19.. [Insert the date of submission].

In witness whereof, etc. [SIGNATURES AND SEALS.]

§ 2338. Report of arbitrators.

Form No. 631.

[TITLE.]

We, the undersigned arbitrators appointed by the agreement of arbitration hereto annexed, respectfully report that the matters in said agreement of arbitration mentioned were duly brought to a hearing before us, on the . . . day of . . . , 19.., at the office of . . . , in the . . . county of . . ., the said A. B. attending with his counsel, C. D., Esq., and E. F. attending with his counsel, G. H., Esq.; and evidence by and on behalf of each of the respective parties having been submitted and received, we find therefrom and make the following award: [Set forth award.]

P. Q.,
R. S.,
X. Y.,
Arbitrators.

[DATE.]

§ 2339. Report of arbitrators or referee on a part of issues, or on an account.

Form No. 632.

[TITLE.]

To the . . . court of . . . :

A reference having been made to me, by order dated the . . . day of . . ., 19.., to . . . in this action, I respectfully report:

That I have heard both parties, and find the annexed account to be correct.

[ACCOUNT.]

[Or, find the following facts: state them.]

C. D., Referee.

§ 2340. Award of arbitrators.

Form No. 633.

In the Matter of the Arbitration of Differences between A. B. and C. D. } Award of Arbitrators.

The undersigned arbitrators, who were duly appointed and agreed upon in the annexed agreement of arbitration to hear

and determine all differences and controversies existing between A. B. and C. D. [or, if a certain particular controversy only was submitted, state what it was, in apt terms], do hereby certify: That on the . . . day of . . ., 19.., we took and subscribed the oath required by law of us as such arbitrators, which oath so taken is hereto attached, and that we gave to each of the parties to said submission . . . days' notice, in writing, of our first meeting.

We further certify, that on the . . . day of . . ., 19.., at the hour of . . . o'clock . . M., at the office of O. P., in the city of . . ., in the state of . . ., pursuant to such notice, we met and proceeded to hear the allegations and evidence of the parties, and that thereafter we duly adjourned from time to time until this . . . day of . . ., 19.., and having heard all of the evidence, proofs, and arguments, we do hereby find and adjudge that there is now due and owing from the said C. D. to the said A. B. the sum of . . . dollars, which sum it is ordered that the said C. D. pay to the said A. B. within . . . days from this day [or, otherwise, state the conclusion of the arbitrators, which statement may be substantially in the forms hereinafter set forth for judgments].

We further certify, that we, as arbitrators, have each been occupied in the hearing of said controversy and in preparing our award . . . days, [and that annexed hereto is a true statement of the witnesses present and the witnesses who were examined before us upon said arbitration, and the number of days that they were severally present].

Dated on the . . . day of . . ., 19.. E. F.,
In presence of: G. H.,
I. K. Arbitrators.

[Add acknowledgment and verification, if required.]

§ 2341. Notice of motion to confirm award.

Form No. 634.

[TITLE OF COURT.]

In the Matter of the Arbitration of certain Controversies between A. B. and C. D.

To C. D., Esq.:

Please take notice, that upon the award of E. F. and G. H., arbitrators appointed by us in a certain agreement dated the . . . day of . . ., 19.., which said award was filed in the office

of the clerk of the . . . court on the . . . day of . . ., 19.., and upon the original agreement of arbitration attached to said award, as well as upon the evidence taken by said arbitrators and filed with said award, [and upon the affidavits of W. X. and Y. Z. attached to this notice], the undersigned will move the said . . . court of . . . county, on the . . . day of . . ., 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order confirming said award, and directing judgment to be rendered in accordance with the terms thereof.

Dated . . ., 19.. A. B.

§ 2342. Order confirming award.

Form No. 635.

[TITLE OF COURT.]

In the Matter of the Arbitration of certain Controversies between A. B. and C. D.

The above-entitled matter having been brought to hearing before the court on the . . . day of . . ., 19.., upon the motion of A. B. to confirm the award made by E. F. and G. H., the arbitrators in the above-entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award, [as well as upon the affidavits of L. M. and N. O.], after hearing C. D., in opposition to said motion, [as well as the affidavits of P. Q. and R. S. filed in opposition thereto], the court being now fully advised with regard to said matter:

It is ordered, that the said award be and the same is hereby in all respects confirmed, and that judgment be entered in favor of the said A. B., adjudging that [here state the particular judgment to be rendered].

Dated this . . . day of . . ., 19..

By the Court: I. K., Judge.

§ 2343. Order modifying award and directing judgment as modified.

Form No. 636.

[Title as in preceding form.]

The above-entitled matter having been brought to hearing before the court on the . . . day of . . ., 19.., upon the motion

of A. B. to modify and correct the award of E. F. and G. H., the arbitrators in the above-entitled matter, which motion was based upon the said award and the agreement of arbitration and all papers filed with said award, [as well as upon the affidavits of L. M. and N. O.], after hearing C. D. in opposition to said motion, [as well as the affidavits of P. Q. and R. S. filed in opposition thereto] the court being now fully advised with regard to said matter:

It is ordered, that the said award be and the same is hereby modified and corrected as follows: [Here state particularly the respects in which the award is modified and corrected.]

And it is further ordered, that judgment be rendered upon the said award as herein modified and corrected.

Dated this . . . day of . . . , 19..

By the Court: I. K., Judge.

§ 2344. Judgment upon award.

Form No. 637.

[TITLE.]

At a term of the . . . court of the county of . . ., held on the . . . day of . . ., 19.., and on the . . . day of . . ., 19.., being a day of said term, the above-entitled matter having come on to be heard, and the court having upon due notice and hearing confirmed [or, modified and corrected] the award of E. F. and G. H., the arbitrators in said matter, and having ordered judgment to be rendered upon the said award so confirmed [or, so modified and corrected]:

It is hereby adjudged and determined, [set forth the judgment rendered in accordance with the order, stating the relief granted as in ordinary judgments].

Dated this . . . day of . . ., 19..

By the Court: I. K., Clerk.

CHAPTER LXXX.

COMPROMISE.

§ 2345. In general.—The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer.[1] An offer under the foregoing section is not to be deemed an admission that anything is due, unless the offer in the terms in which it is made is accepted, in which case judgment is entered.[2] The distinction between an "offer to compromise" and a *cognovit* at common law should be kept in mind; the latter being good as an admission *in pais* after answer filed.[3] If judgment is entered upon the *cognovit*, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where upon complaint and answer denying the allegations thereof, the acknowledgment is used as evidence, interest may be given by way of damages.[4] An offer made to accept a smaller amount before suit is brought is deemed withdrawn by the commencement of suit, if the offer has not prior to that time been accepted.[5] The "offer to compromise" and a *cognovit* depend for their effect upon actions already brought, and are therefore to be distinguished from a warrant of attorney to confess judgment, which is given before action brought, and the offer in writing under section 2074 of the California Code of Civil Procedure, which may be made either before or after action brought. The true meaning of the statute

1 Cal. Code Civ. Proc., § 997. See, also, same code, § 895.

2 See Cal. Code Civ. Proc., § 2078.

3 Hirschfield v. Franklin, 6 Cal. 607.

4 Id. See Campbell v. Goddard, 117 Ill. 251, 7 N. E. 640.

5 Peachy v. Witter, 131 Cal. 316, 63 Pac. 468.

authorizing the clerk to enter judgment upon an offer on the part of defendant to suffer judgment for a specified sum, etc., is that he can enter judgment only when the offer is made after action is brought by the filing of the complaint and while pending; and where the party hands to the clerk the complaint, offer of judgment, and notice of acceptance of the offer, at the same time, and thereupon the clerk enters judgment, it is void.[6] If the defendant at any time before the trial offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he does not accept such offer before the trial, and fails to recover in the action a sum in excess of the offer, he cannot recover costs incurred after the offer; but costs must be adjudged against him, and, if he recover, be deducted from his recovery. But the offer and failure to accept it cannot be given in evidence, nor affect the recovery, otherwise than as to costs.[7] An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.[8] If defendant tenders such stock as the court afterwards finds he is under contract bound to deliver to plaintiff, and keeps his tender good, the judgment should be for plaintiff for such stock and for defendant for the costs.[9] The tender may be made to the adverse party instead of to his attorney.[10]

§ 2346. **Consideration.**—The compromise of a doubtful claim and the desire to avoid a lawsuit are sufficient consideration for the release of the parties' rights to such claim.[11]

§ 2347. **Interpretation of compromise.**—Parol proof may be used to show that a settlement of all claims and demands then or theretofore existing applied only to certain fruit transactions, and not to defendant's liability for subsequent calls on stock

6 Crane v. Hirschfelder, 17 Cal. 582.

7 Cal. Code Civ. Proc., § 895.

8 Cal. Code Civ. Proc., § 2074.

9 Williams v. Ashurst Oil Co., 144 Cal. 619, 78 Pac. 28.

10 Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

11 Dickie v. Steiger, 4 Cal. App. 622, 88 Pac. 814; Russel v. Lambert, 14 Idaho, 284, 94 Pac. 54; Dickey v. Jackson, 47 Or. 531, 84 Pac. 701; Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724; Hutchinson v. Mt. Vernon W. & P. Co., 49 Wash. 469, 95 Pac. 1023.

subscribed for by defendant prior to the execution of the receipt,[12] and the intention of the parties will be enforced.[13]

§ 2348. Vacating compromise settlement.—In the absence of fraud or violation of a trust, a party to a compromise cannot complain of the other party for not volunteering information which would have prevented the settlement.[14] A compromise secured by false representations of a judgment debtor as to his poverty can be set aside for fraud.[15]

§ 2349. Defense of compromise.

Form No. 638.

I. That before the commencement of this action, the plaintiff having demanded said sum [or, said goods, or otherwise] from the defendant, the defendant refused to pay the same, because [here state the facts showing the claim a doubtful one].

II. That the parties thereupon agreed to compromise said claim, and that the defendant should pay, and the plaintiff accept, . . . dollars in satisfaction thereof.

III. That on the . . . day of . . . , 19.., in pursuance of said agreement, the defendant did pay, and the plaintiff did accept, said sum of . . . dollars in full satisfaction of the plaintiff's said claim.

12 California Packers Co. v. Merritt Fruit Co., 6 Cal. App. 507, 92 Pac. 509.

13 Rutan v. Huck, 30 Utah, 217, 83 Pac. 833.

14 Multnomah County v. Dekum 51 Or. 83, 93 Pac. 821.

15 Greenawalt v. Rogers, 151 Cal. 630, 91 Pac. 526; Heinrich v. Heinrich, 2 Cal. App. 479, 84 Pac. 326.

CHAPTER LXXXI.

SUBMITTING CONTROVERSY WITHOUT ACTION.

§ 2350. In general.—Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties.[1] Parties cannot, by agreeing upon a statement of facts, invoke the aid of a court for the decision of what to them, or either of them, is merely a moot question of law.[2] The agreed case must show a question in difference between the parties which might be the subject of a civil action.[3] Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceeding prior to the trial. Counsel, under section 1138 of the California Code of Civil Procedure, may agree as to facts, but they cannot control the supreme court by a stipulation as to the sole, or any, question of law to be determined under them. When a particular legal conclusion follows from a given statement of facts, no stipulation can prevent the court from so declaring.[4] The case, the submission, and a copy of the judgment shall constitute the judgment-roll,[5] and may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.[6] Where the judgment recites that the cause was decided upon an agreed statement of all the facts, such agreed statement may be considered upon appeal, whether it constitutes a part of the judgment-roll or not.[7] Where an appeal

1 Cal. Code Civ. Proc., § 1138. See, also, Alaska Codes, pt. 4, ch. 29, §§ 248-250; Idaho Rev. Codes, §§ 5068-5070; Or. B. & C. Codes, §§ 41, 193, 195, 199, 413; S. Dak. Code Civ. Proc., §§ 787-789; Utah Rev. Stats., §§ 3218-3220.

2 Johnson v. Malloy, 74 Cal. 430, 16 Pac. 228.

3 White v. Clarke, 111 Cal. 425, 44 Pac. 164; Matter of De Lucca, 146 Cal. 110, 79 Pac. 853, sub nom. De Lucca v. Price.

4 San Francisco L. Co. v. Bibb, 139 Cal. 325, 73 Pac. 864.

5 Cal. Code Civ. Proc., § 1139; Hartman v. Smith, 7 Mont. 19, 14 Pac. 648. See Sweet v. Myers, 3 S. Dak. 324, 53 N. W. 187.

6 Cal. Code Civ. Proc., § 1140.

7 Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364.

is taken from a decision of the justice's court in such a case, the transcript on appeal must contain a copy of the affidavit required by the same section, showing the reality of the controversy and good faith of the proceeding.[8] Where, instead of this affidavit, the record only showed an allegation in the agreed statement on appeal that the cause was heard in the court below on an agreed statement of facts, and the affidavit of the defendant that the controversy was real, the appeal was dismissed.[9] Where the parties to a controversy made an agreed case, under section 377 of the California Practice Act,[10] which was submitted for decision to the district court, the consideration of the court was restricted to the facts submitted in the case.[11] The superior court is without jurisdiction, upon the submission of a controversy to it without action, to determine the question as to whether a search-warrant was issued without jurisdiction and authority of law,[12] where the only claim is that the justice has, in the exercise of the duties of his office, exceeded his jurisdiction in the issuance of such warrant, and that another officer, not a party to the proceeding, acting under a void warrant, is about to harm claimant.[13] And the judgment of the court cannot be based upon any other facts which it may suppose one of the parties can establish.[14] No findings are necessary or required where an agreed statement covers all the facts in the case.[15] And a new trial cannot be had, there being no questions of fact to settle.[16] Where the plaintiff claimed that the defendant was indebted to him, and, under the section above referred to, a case was made and submitted, stating the facts agreed upon between the parties, upon which the district court decided that plaintiff's demand was not established without proof of other additional facts, it was held that it was error for the court, instead of rendering judgment for the defendant, to make an order based upon the supposition that plaintiff established such other facts.[17]

8 Mellois v. Chaine, 20 Cal. 679.

9 Id. See, also, White v. Clarke, 111 Cal. 425, 44 Pac. 164.

10 Cal. Code Civ. Proc., § 1138.

11 Crandall v. Amador County, 20 Cal. 72.

12 Matter of De Lucca, 146 Cal. 110, 79 Pac. 85, sub nom. De Lucca v. Price.

13 Id.

14 Green v. Fresno County, 95 Cal. 329, 30 Pac. 544.

15 Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; Muller v. Rowell, 110 Cal. 318, 42 Pac. 804.

16 Sheets v. Henderson, 77 Kan. 761, 93 Pac. 577.

17 Crandall v. Amador County, 20 Cal. 72.

§ 2351. Parties who may submit controversy.—This provision[17a] has reference to interested parties, authorized and capable of litigating the question involved; and only such parties may by their agreement confer jurisdiction upon the court "to hear and determine the case and render judgment thereon as if the action were depending."[18] Where the validity of a tax is in question, the tax-collector has no right, without the intervention of an action, to submit to adjudication a controversy regarding the validity of such tax, in which the rights of the county are directly involved, without an opportunity on its part to be heard; and an objection to the jurisdiction, interposed by the district attorney on behalf of the county, should be sustained. The taxpayer and the county are the only parties to the "question in difference" involving the validity of the tax.[19] A tribunal, board, or officer exercising judicial functions is not authorized to litigate as a party a mere question as to whether it has, in the doing of an official act, exceeded its jurisdiction.[20]

FORMS FOR SUBMISSION OF CONTROVERSY.

§ 2352. Submission of controversy without action.

Form No. 639.

[Title same as in pleading.]

The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed on are as follows: [Set forth facts as agreed.]

The points in controversy, and upon which the decision of the court is asked, are as follows: [State points in controversy.]

[DATE.] [SIGNATURES.]

§ 2353. Affidavit to submission.

Form No. 640.

[VENUE.]

A. B. and C. D., the parties to the foregoing case, being duly and severally sworn, each for himself says that the controversy set

17a Cal. Code Civ. Proc., § 1138.

18 Matter of De Lucca, 146 Cal. 110, 79 Pac. 853, sub nom. De Lucca v. Price.

19 Bailey v. Johnson, 121 Cal. 562, 54 Pac. 80.

20 Matter of De Lucca, 146 Cal. 110, 113, 79 Pac. 853, sub nom. De Lucca v. Price.

forth in the foregoing submission is real, and the proceedings are in good faith to determine the rights of the said parties.

[JURAT.] [SIGNATURES.]

§ 2354. Submission of controversy without action.

Form No. 641.

[TITLE OF COURT.]

A. B., Plaintiff,
v.
C. D., Defendant.

There being a controversy between the above-named parties, it is hereby agreed by the said parties, that the same be submitted to the court for the determination of said controversy; and it is further agreed, that the following is a statement of the facts upon which said controversy depends: [State all the facts, as in a pleading.]

It is further agreed, that this submission shall be filed with the county clerk of . . . county, and that the facts herein stated are admitted by the parties for the purpose of this submission only, and are not to be construed as admissions binding either party, save for the purposes of this proceeding.

Upon said facts the plaintiff demands judgment that [state relief desired by the plaintiff], and the defendant demands judgment that [state relief desired by the defendant].

[DATE.] A. B.
C. D.

[VENUE.]

A. B. and C. D., being each duly sworn, each for himself says that the controversy named in the foregoing statement of facts and submission is a real controversy, and that the said submission is made in good faith for the purpose of determining the rights of the parties. A. B.

[JURAT.] C. D.

§ 2355. Judgment upon submission.

Form No. 642.

[TITLE.]

The parties above named having agreed upon a case, and the same having been duly verified and submitted to this court, after hearing M. N., Esq., for the said A. B., and O. P., Esq., for the

said C. D., the court being now fully advised; on motion of M. N., Esq., attorney for said A. B. [or, O. P., Esq., attorney for said C. D.]:

It is hereby adjudged, that [here state the relief granted, using the proper form as in other judgments].

§ 2356. Finding of court upon submission.

Form No. 643.

[TITLE.]

The parties above named, having duly submitted to this court a statement of certain facts duly agreed upon, with reference to a certain controversy existing between them, and having prayed the determination of this court thereon, and the said matter having been duly heard at a regular term of this court, E. F., Esq., appearing for the said plaintiff, and G. H., Esq., appearing for the said defendant:

The court now finds upon the facts so submitted, as conclusions of law: [Here state the conclusions of the court, following the proper form of a finding in a case tried before the court.]

Let judgment be entered accordingly.

Dated this . . . day of . . ., 19...

By the Court: I. K., Judge.

§ 2357. Judgment on the foregoing finding.

Form No. 644.

[TITLE.]

The above-entitled matter having been submitted to the determination of the court by the above-named parties upon the agreed statement of facts on file, and the said parties having also filed their affidavit, by which it appears that the said controversy is real, and the proceeding brought in good faith to determine the rights of the parties, and the court having heretofore made and filed its finding and determination herein, and ordered judgment upon such finding:

Now, upon motion of E. F., Esq., attorney for said A. B.,

It is adjudged, etc. [Here insert the proper judgment as ordered in the findings.]

Dated this . . . day of . . ., 19..

By the Court: L. M., Clerk.

CHAPTER LXXXII.

TENDER.

§ 2358. In general.—Section 2074 of the California Code of Civil Procedure provides that "an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property"; otherwise, in order to constitute a valid tender, the money or thing must be produced. The production of it must be proved, with an actual offer of it to the creditor, unless it be shown that the latter dispensed with it by some positive act or declaration to that effect. An offer made by plaintiff to defendants, by means of a letter, notifying them that the goods were on hand ready for delivery under the contract between the parties, is sufficient.[1] An offer, in writing, to surrender the title of lots, in pursuance of the terms of an agreement, is equivalent to the actual production and tender of a written release or quitclaim when not accepted.[2] One who is entitled, under an agreement for conveyance of land, to a deed is not required, where he offers in writing to make the payment, to produce the money, or to permit it to be counted, in order to constitute a valid tender, so long as the other party to the contract does not accept the offer.[3] Having the money in one's pocket or elsewhere, and offering to pay, without producing the money, is not enough; there must be an actual offer and presentation, so that the creditor can either take or refuse it at his option;[4] and it must be unconditional;[5] except such conditions as were by the terms of the contract conditions precedent to the performance thereof.[6] So an offer to pay, provided the other party will give a receipt in full, is not a sufficient tender.[7] But a receipt for the money paid, or for the

1 Levis v. Royal P. & D. Co., 1 Cal. App. 241, 81 Pac. 1086.

2 Herberger v. Husman, 90 Cal. 583, 27 Pac. 428.

3 Latimer v. Capay Valley L. Co., 137 Cal. 286, 70 Pac. 82.

4 Bakeman v. Pooler, 15 Wend. 637; Dunham v. Jackson, 6 Wend. 22; Strong v. Blake, 46 Barb. 227; Englander v. Rogers, 41 Cal. 420.

5 Roosevelt v. Bull's Head Bank, 45 Barb. 579. See Barnhart v. Fulkerth, 73 Cal. 526, 15 Pac. 89.

6 Wheelock v. Tanner, 39 N. Y. 481.

7 Clark v. Mayor of New York, 1 Keyes, 9.

delivery of an instrument or property, may be demanded as a condition of the payment or delivery.[8] And the tender must be kept at all times ready for payment.[9] Where, by terms of an agreement, a certain sum of money was to be paid and a note delivered, a tender of such money upon one day and the note on another is valid, if no objection be made at the time of the tender because of such fact.[10] Any such written tender, not made in good faith, by one able to perform is ineffectual, though pursuant to the provision of section 1498 of the California Civil Code, that one making a tender may make it depend on the due performance of a concurrent condition.[11]

§ 2359. Acceptance of tender.—If not accepted within five days, the tender is deemed withdrawn;[12] and it is of no avail to sustain a judgment for defendant.[13]

The acceptance by plaintiff of a tender deposited in court, if made after judgment in his favor for the full claim, is not a waiver of the balance allowed by the judgment.[14]

Acceptance of a general tender of earned rent-money paid into court does not establish the other party's claim of a parol lease.[15]

8 Cal. Code Civ. Proc., § 2075.

9 Roosevelt v. Bull's Head Bank, 45 Barb. 579; Redington v. Chase, 34 Cal. 666; Bryan v. Maume, 28 Cal. 238; Cal. Code Civ. Proc., § 1830; Wolff v. Canadian Pac. Ry. Co., 89 Cal. 332, 26 Pac. 825; Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111; Adams v. Rutherford, 13 Or. 78, 8 Pac. 896. See, as to tender generally, Karker v. Haverly, 50 Barb. 79; Clark v. Mayor of N. Y., 1 Keyes, 9; Cal. Civ. Code, §§ 1485-1505. Under the statute of California and decisions of our courts, see, generally, Cal. Code Civ. Proc., §§ 704, 1030, 2074, and 2075. On sale and delivery, see Id.; Lamott v. Butler, 18 Cal. 32. As to money tender, see Curiac v. Abadie, 25 Cal. 502. As to legal-tender notes, see Vilhac v. Biven, 28 Cal. 409. When necessary to maintain action, see Folsom v. Bartlett, 2 Cal. 163; Vance v. Dingley, 14 Cal. 53; Crosby v. Watkins, 12 Cal. 85. When not necessary, see Goodale v. West, 5 Cal. 339. By whom made, see Mahler v. Newbaur, 32 Cal. 168, 91 Am. Dec. 571. See, generally, People v. Hays, 4 Cal. 127; Gaven v. Hagen, 15 Cal. 208; Redington v. Chase, 34 Cal. 666; Tompkins v. Batie, 11 Neb. 147, 38 Am. Rep. 361, 7 N. W. 747; Pinney v. Jorgensen, 27 Minn. 26, 6 N. W. 376; Weaver v. Nugent, 72 Tex. 272, 13 Am. St. Rep. 792, 10 S. W. 458; Noyes v. Wyckoff, 114 N. Y. 204, 21 N. E. 158; Henderson v. Cass County, 107 Mo. 50, 18 S. W. 992.

10 Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758.

11 Doak v. Bruson, 152 Cal. 17, 91 Pac. 1001.

12 Colo. Civ. Code, § 281.

13 Mitchell v. Pearson, 34 Colo. 278, 82 Pac. 446.

14 Traynor v. White, 44 Wash. 560, 87 Pac. 823.

15 Dechenbach v. Rima, 50 Or. 540, 93 Pac. 464.

§ 2360. **Continuing tender.**—An obligation for the payment of money is extinguished by an offer of payment accompanied by a deposit in a bank and notice thereof to the creditor,[16] but such tender without the deposit does not.[17] A deposit of the balance due on a note, to be paid upon surrender of the note, is not such a tender.[18] The deposit of a smaller amount does not keep the tender good.[19] To make a redemption of a pawn, it must appear that the tender was kept good at all times and brought into court.[20] A mortgagor having tendered the amount due before sale of the mortgaged chattel, need not keep his tender good to sustain his suit in claim and delivery.[21]

§ 2361. **Effect of tender.**—The purpose of the statute which requires an objection to be stated if it is to the amount, is to inform the debtor of the amount claimed by the creditor, so that the former may have an opportunity to meet the demand, if he wishes to do so, and to do away with many objections by which rights of parties had theretofore been defeated. It should be construed liberally.[22] Where, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant.[23] In such case, judgment should be for the plaintiff for the amount tendered, and for the defendant for his costs.[24] The defendant, to entitle himself to costs, must not only aver a tender, but that he has always been and is ready to pay the sum tendered, and must bring it into court.[25] A tender of the principal and interest to the date of the tender stops interest from the time of the tender.[26] A tender which is not

16 Cal. Civ. Code, § 1500.

17 Redpath v. Evening Express Co., 4 Cal. App. 361, 88 Pac. 287; Kerr v. Moore, 6 Cal. App. 305, 92 Pac. 107.

18 Righetti v. Righetti, 5 Cal. App. 249, 90 Pac. 50.

19 Anderson v. Griffith, 51 Or. 116, 93 Pac. 934.

20 Andrews v. Uncle Joe, 44 Wash. 668, 87 Pac. 947.

21 Thomas v. Seattle B. & M. Co., 48 Wash. 560, 125 Am. St. Rep. 945, 94 Pac. 116, 15 L. R. A. (N. S.) 1164.

22 Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Shafer v. Willis, 124 Cal. 36, 56 Pac. 635.

23 Cal. Code Civ. Proc., § 1030.

24 Curiac v. Abadie, 25 Cal. 502.

25 Bryan v. Maume, 28 Cal. 238.

26 Patterson v. Sharp, 41 Cal. 133; Cal. Civ. Code, § 1504; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93.

kept good does not have the effect of stopping interest.[27] A tender of a sum less than the amount found due is not available as a defense,[28] unless no objection was made at the time as to the amount.[29] The tender of the amount due on a debt secured by a mortgage does not release the lien.[30]

§ 2362. Objections to tender.—The person to whom a tender is made must, at the time, specify any objections he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards,[31] as also his objections to the mode of offer of performance.[32] Only those objections made at the time of the tender can be raised afterwards.[33] The offer of a nominal sum only is not a due tender, and claimant forfeits no right by not specifying his objection thereto.[34]

27 Thornburgh v. Fish, 11 Mont. 53, 27 Pac. 381. As to effect of tender, see Oregon Ry. etc. Co. v. Oregon etc. Co., 10 Or. 444; Simpson v. Carson, 11 Or. 361, 8 Pac. 325.

28 San Pedro Lumber Co. v. Reynolds, 111 Cal. 588, 44 Pac. 309.

29 Oakland Bank of Savings v. Applegarth, 67 Cal. 86, 7 Pac. 139, 476. As to tender of performance, see Hyde v. Heller, 10 Wash. 586, 39 Pac. 249.

30 Perre v. Castro, 14 Cal. 530, 76 Am. Dec. 444; Himmelman v. Fitzpatrick, 50 Cal. 650. See, also, Hawkins v. Hill, 15 Cal. 499, 76 Am. Dec. 499; Mahler v. Newbaur, 32 Cal. 168, 91 Am. Dec. 571.

31 Cal. Code Civ. Proc., § 2076; Cal. Civ. Code, § 1501; Oakland Bank of Savings v. Applegarth, 67 Cal. 86, 7 Pac. 139, 476; Latimer v. Capay Valley L. Co., 137 Cal. 286, 70 Pac. 82.

32 Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115.

33 Estate of Pearsons, 102 Cal. 569, 36 Pac. 934; Hidden v. German Sav. etc. Soc., 48 Wash. 384, 93 Pac. 668.

34 Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 Pac. 225.

CHAPTER LXXXIII.

HABEAS CORPUS.

§ 2363. In general.—The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained.[1] It is a special civil proceeding.[2] It may be used to get one out of an insane asylum, when illegally restrained.[3] But in case of one adjudged guilty of contempt the relief is by writ of error, and not *habeas corpus*.[4] The office of the writ of *habeas corpus* is to test jurisdiction; but the fact that the same can be tested by other speedy means is no cause for not issuing the writ.[5] The writ of *habeas corpus*, when issued to inquire into the cause of an imprisonment, is in the nature of a writ of error, and when allowed and heard by an officer of the court, the officer is deemed a court, within the meaning of the act which forbids certain persons to be discharged before the expiration of the sentence, except upon a review by a court of superior jurisdiction to the magistrate making the commitment.[6]

§ 2364. The right of personal liberty.—Personal liberty is defined to be the power of unrestrained locomotion.[7] It is the right to do all things which a person wants to do, when the doing of those things will not violate any principle of common justice. It is the right to pursue happiness in any way a man may choose, so that he does not give others misery. It is the unrestrained power to do right, with all reasonable restraints against doing wrong. Personal liberty does not mean license to commit crimes,

1 Hurd on Habeas Corpus, 143; In re Moyer, 35 Colo. 159, 117 Am. St. Rep. 189, 85 Pac. 190.

2 Winnovich v. Emery, 33 Utah, 345, 93 Pac. 988.

3 Byers v. Solier, 16 Wyo. 232, 93 Pac. 59, 14 L. R. A. (N. S.) 468.

4 Ex parte Stidger, 37 Colo. 407, 86 Pac. 219.

5 State v. Dist. Court, 35 Mont. 321, 89 Pac. 63; Ex parte Farrell, 36 Mont. 254, 92 Pac. 785; Ex parte Patman, 20 Okla. 846, 95 Pac. 622.

6 3 Bl. Com. 131, 132; Alder v. Chip, 2 Burr. 755, 756, 97 Eng. Reprint, 548; Ingersoll on Habeas Corpus, 36; In re Yates, 4 Johns. 360; Bac. Abr., tit. Habeas Corpus, A; Ex parte Watkins, 3 Pet. 203, 7 L. Ed. 650; Case of the Twelve Commitments, 19 Abb. Pr. 394; Matter of Miller, 1 Daly, 562.

7 Hurd on Habeas Corpus, 1.

or to go forth and be the judge in one's own case, and impose the penalty and inflict the punishment of real or fancied wrongs without restraint. In ordinary terms, it means that we, as members of society, owing duties to it and receiving benefits from it, will do unto others as we would they would do unto us. Governments are formed for the purpose of securing and protecting men in the employment of their natural rights, and they would fail of accomplishing that object if the powers to regulate or prescribe the mode in which such rights are to be exercised be not lodged in the law-making department.[8] Hence this provision of the constitution is not to be understood as putting life or liberty entirely beyond the reach of the government, if, for misconduct, the general welfare of the community demands its sacrifice or restraint; or as allowing every one to acquire property after his own unregulated manner, and according to his own uncontrolled will, but in such a manner and by such means as the general welfare of the community may require him to observe. While the exercise of these rights cannot be denied to any one, it may be regulated.[9]

As a legislature is not prohibited from all interference with the rights enumerated in the constitution, such reasonable restraints as tend to keep man's passions in due bounds are not infringements upon his right of personal liberty. If it were so, then personal liberty would mean barbarism. These restraints are prescribed by the supreme power in the state, and a cheerful obedience to them is one of the chief evidences of an enlarged security for life, liberty, and property. Every act which may tend to impair the exercise of the natural right of persons beyond what is needful for the general good may be prohibited. But the instances are many, even in the history of our own country, when a citizen has been restrained of his personal liberty without due process of law, and this, too, when he has committed no wrong, or, if he has, when he is being punished in an illegal manner. Hence the wisdom of our ancestors provided a means by which a person so restrained of his liberty contrary to law might in a speedy manner be freed. This means is the writ of *habeas corpus*, the privilege of which writ shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.[10]

8 Ex parte Smith, 38 Cal. 702.
9 Ex parte Smith, 38 Cal. 702, 705.
10 U. S. Const., art. 1, § 9, subd. 2; Cal. Const., art. 1, § 5.

§ 2365. **Right of bail.**—In nearly every state in the Union all offenses are bailable, except only such felonies as are punishable by death, and in those cases "the proof must be evident, or the presumption great," to deprive the party of the right of bail.[11] In some states, the right to bail, where the proof is not thus evident, in capital cases, is not guaranteed by the constitutions thereof, but even then the right is as fully secured by the decisions of their courts.[12] *Habeas corpus* proceeding in the supreme court is the proper practice when bail is refused on appeal.[13] The varied and sometimes difficult questions presented to the courts, when application for bail is made by a party charged with the commission of a felony, become matters of judicial discretion. No two cases are alike, and the judge necessarily stands between the liberty of the petitioner and the offended law. In capital cases, the fact as to whether the proof is evident or the presumption great may often cause a judge to doubt between two opinions. The discretion above referred to means a conscientious, a legal discretion. Under the benign influence of a modern civilization, the punishment imposed for the commission of the most heinous crimes is inflicted not so much to cause the subject pain as to avoid its repetition, to warn others against the committing of a like offense. Hence vindictive punishments and long imprisonments, except in rare and extreme cases, are unknown in American jurisprudence.

§ 2366. **Restraint necessary.**—If, when the writ is served, the complainant is not in fact in jail, but permitted to go about without apparent restraint, the petition should be dismissed;[14] nor will the writ be sustained on stipulation of the district attorney that the petitioner be considered in custody for the purpose of the hearing. And one who has been released on bail cannot secure a writ because he has not had a speedy trial.[15] The petition will be dismissed if the restraint is merely nominal, and not actual.[16]

§ 2367. **Application.**—Application for a writ of *habeas corpus* is made by petition, and must specify—1. That the person in whose

11 Hurd on Habeas Corpus, 434.

12 See Ex parte Taylor, 5 Cow. 39; Jones v. Kelly, 17 Mass. 116; Evans v. Foster, 1 N. H. 374; State v. Everett, 1 Hill, 398, note; Hurd on Habeas Corpus, 437.

13 Packenham v. Reed, 37 Wash. 258, 79 Pac. 786.

14 In re O'Brien, 29 Mont. 530, 75 Pac. 196.

15 In re Dykes, 13 Okla. 339, 74 Pac. 506.

16 In re Gow, 139 Cal. 242, 73 Pac. 145; Ex parte Schmitz, 150 Cal. 663, 89 Pac. 438.

behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them if they are not known; 2. If the imprisonment is alleged to be illegal, the petition must state in what the illegality consists. The evidence taken at preliminary examination should be set forth in the petition, where the ground is lack of reasonable or probable cause.[17] 3. The petition must be verified by the oath or affirmation of the party making the application. It must also be signed either by the party for whose relief it is intended, or by some person in his behalf.[18] An insane person, or one held in custody as such, may petition for a writ of *habeas corpus* as well as his relatives or friends may.[19] When the ground of the petition is that the prisoner has been committed without reasonable or proper cause, it must set out what the evidence on the examination was, in such form that perjury may be assigned on false allegations.[20]

§ 2368. By whom granted.—The writ may be granted by the supreme court, or any justice thereof, upon petition upon behalf of any person restrained of his liberty in this state. When so issued, it may be made returnable before the court, or any justice thereof, or before any superior court, or judge thereof. It may be granted by a superior court or judge thereof on behalf of any person restrained of his liberty within their respective counties.[21] The supreme court is always open for issuing this writ.[22] Superior judges may at chambers grant the writ, or hear and dispose of it.[23] The supreme court of Washington has original jurisdiction in *habeas corpus* to issue the writ or make the order *nisi* in all cases.[24] Where

17 Ex parte Lapique, 139 Cal. xix, 72 Pac. 995; State v. Second Judicial District, 26 Mont. 275, 67 Pac. 943.

18 Cal. Pen. Code, § 1474. See, also, Cal. Pen. Code, § 1476; Alaska Codes, pt. 4, ch. 57, §§ 566-608; Ariz. Pen. Code, §§ 1221, 1222; Idaho Rev. Codes, § 8341; Mont. Rev. Codes, §§ 9630-9640; Nev. Comp. Laws, §§ 3446, 3447; N. Mex. Comp. Laws, §§ 2803, 2804; Or. B. & C. Codes, §§ 621-623, 659; Utah Rev. Stats., § 1072; Wash. Bal. Codes, § 5817; Wyo. Rev. Stats., §§ 5466, 5467; Colo. Mills' Stats., § 2106.

19 In re Everett, 138 Cal. 490, 71 Pac. 566.

20 Ex parte Walpole, 84 Cal. 584, 24 Pac. 308; Ex parte Buckley, 105 Cal. 123, 38 Pac. 686.

21 Cal. Pen. Code, § 1475; In re Jewett, 69 Kan. 830, 77 Pac. 567.

22 Cal. Code Civ. Proc., § 47.

23 Cal. Code Civ. Proc., §§ 166, 176.

24 In re Rafferty, 1 Wash. 382, 25 Pac. 465.

a writ of *habeas corpus* issued by the supreme court is made returnable before a judge of a superior court, his authority is the same as that of the supreme court would have been if the writ had been made returnable before it, and, therefore, his order is not in excess of his authority.[25]

§ 2369. **Fees.**—No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings upon *habeas corpus*.[26]

§ 2370. **To whom directed.**—The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, at a time and place therein specified.[27] If the person to whom the writ is directed refuses to obey the same, the court or judge must, upon affidavit, issue an attachment for his apprehension, and he may be committed to jail until he makes due return to the writ, or is otherwise discharged.[28]

§ 2371. **Return.**—The person on whom the writ is served is required to produce the body of the person under his custody or restraint, according to the command of the writ, unless prevented by the sickness or infirmity of the person to be produced, which fact must be shown by affidavit, in which case the cause may proceed in his absence, or the hearing be adjourned until he can be produced.[29]

§ 2372. **Repeated applications.**—The doctrine of *res adjudicata* does not apply to proceedings on *habeas corpus*, and the refusal to grant the writ is no bar to a second application.[30] The supreme

25 People v. Booker, 51 Cal. 318. Consult Ex parte Marks, 49 Cal. 680.

26 Cal. Pol. Code, § 4333.

27 Cal. Pen. Code, § 1477. As to delivery to the officer for service, see Cal. Pen. Code, § 1478.

28 Cal. Pen. Code, § 1479.

29 Cal. Pen. Code, §§ 1481, 1482. The requisites of a return are found in the Penal Code, § 1480.

30 In re Edward Ring, 28 Cal. 247; In re Perkins, 2 Cal. 424. See, under common-law rule, Ex parte Partington, 13 Mees. & W. 679; In re Parker, 5 Mees. & W. 32; The King v. Suddis, 1 East, 306, 314; Burdett v. Abbott, 14 East, 91; Watson's Case, 9 Ad. & El. 731; Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597. Compare In re Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Robinson, 6 McLean, 355, Fed. Cas. No. 11935.

court of Washington will not take original jurisdiction of an application for a writ of *habeas corpus* after the denial of the writ in the same matter by a superior court.[31]

In a controversy between two parties over the custody of a child, there being no question of personal liberty, all matters in issue arising on the same state of facts, determined in a prior proceeding, are *res adjudicata;*[32] but where the welfare of the child requires it, another court may make a different order, though no material change of circumstances is shown.[33] A decision of the supreme court on *habeas corpus* is not available as *res adjudicata* on *certiorari* to review the judgment.[34]

§ 2373. **Proceedings and practice—Bail.**—When any person is imprisoned or detained in custody on any criminal charge for want of bail, he is entitled to a writ of *habeas corpus*, for the purpose of giving bail, upon averring that fact in his petition, without alleging that he was illegally confined.[35] On the hearing, the judge may, if the offense is bailable, take an undertaking as in other cases, and file the same in the proper court.[36] Admission to bail is the order of a competent court or magistrate, that the defendant be discharged from actual custody upon bail.[37]

§ 2374. **Custody.**—A person convicted of a crime against the United States by a federal court, and confined in the prison of the state, with the consent of the state, is in the custody of the federal authorities.[38]

31 In re Graham, 7 Wash. 237, 34 Pac. 931.

32 In re Hamilton, 66 Kan. 754, 71 Pac. 817; In re Clifford; Clifford v. Williams, 37 Wash. 460, 107 Am. St. Rep. 819, 79 Pac. 1001.

33 In re King, 66 Kan. 695, 97 Am. St. Rep. 399, 72 Pac. 263, 67 L. R. A. 783.

34 Rogers v. Superior Court, 145 Cal. 88, 78 Pac. 344.

35 Cal. Pen. Code, § 1490.

36 Cal. Pen. Code, § 1491.

37 Cal. Pen. Code, § 1268. If the offense charged is punishable with death, see Cal. Pen. Code, § 1270. Pending an appeal in other cases, after conviction, see Cal. Pen. Code, §§ 1272, 1273, 1274; Ex parte Voll, 41 Cal. 29. When the defendant has been held to answer after examination, see Cal. Pen. Code, § 1277. As to form of undertaking, see Cal. Pen. Code, § 1278. As to qualification of bail, see Cal. Pen. Code, §§ 1279-1281. Upon indictment before conviction, see Cal. Pen. Code, §§ 1284-1287; Ex parte McLaughlin, 41 Cal. 212, 10 Am. Rep. 272. As to deposit instead of bail, see Cal. Pen. Code, § 1295. For general principles touching discharge of person charged with a criminal offense, see Cal. Pen. Code, § 1489.

38 Ex parte Le Bur, 49 Cal. 159.

§ 2375. Defects of form.—No writ of *habeas corpus* can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought.[39] The function of the petition is to secure issuance of the writ, and when the writ is issued the petition has performed its purpose.[40]

§ 2376. Discharge.—When a party is "in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same," he will be discharged on *habeas corpus*.[41] So when the indictment charges an offense not known to the law.[42] So where five females were brought before the court on a return to a writ of *habeas corpus*, and the person in whose custody they were neither showed nor claimed any legal right to detain them, they were discharged.[43] A prisoner committed on final process will not be discharged on *habeas corpus* by reason of defects in the judgment, unless the judgment is absolutely void.[44] He will be discharged when the facts charged and proved do not constitute a public offense.[45] So a defendant in a civil action held in custody under an order of arrest, based upon an insufficient affidavit, will be discharged.[46] So of a person subjected to punishment for violation of an unconstitutional municipal ordinance.[47] So of a person unreasonably detained as a witness.[48] And a person denied a "speedy trial" as guaranteed by the federal constitution is entitled to discharge on *habeas corpus*.[49] If the warrant of commitment be informal or insufficient, the court, upon *habeas corpus*, will discharge the prisoner; but if sufficient cause appear, will re-

39 Cal. Pen. Code, § 1495.

40 Ex parte Collins, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

41 Ex parte Jenkins, 2 Wall. Jr. 521, 2 Am. Law Reg. 144, Fed. Cas. No. 7259.

42 In re Corryell, 22 Cal. 178.

43 Ex parte Queen of the Bay, 1 Cal. 157.

44 People v. Smith, 1 Cal. 9. If the judgment be void, that the prisoner will be discharged, see Ex parte Kearney, 55 Cal. 212; Ex parte Mirande, 73 Cal. 365, 14 Pac. 888.

45 Ex parte McNulty, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; Ex parte Prince, 27 Fla. 196, 26 Am. St. Rep. 67, 9 South 659.

46 In re Vinich, 86 Cal. 70, 26 Pac. 528.

47 Ex parte Keeney, 84 Cal. 304, 24 Pac. 34.

48 Ex parte Dressler, 67 Cal. 257, 7 Pac. 645.

49 United States v. Fox, 3 Mont. 512. Compare State v. Conrow, 13 Mont. 554, 35 Pac. 240; Benton v. Commonwealth, 90 Va. 333, 18 S. E. 282.

commit him in proper form.[50] Where the prisoner is not discharged on a writ of *habeas corpus*, it is the duty of the court to remand him.[51] Where the evidence produced upon the examination shows that the offense charged has been committed, and it cannot be said that it was insufficient to warrant the committing magistrate in holding the petitioner to answer, he will be remanded.[52] The release on *habeas corpus* of a prisoner charged with felony is determinative of his present liberty only, and is not a bar to further prosecution, if the release is on account of failure to prosecute.[53]

§ 2377. Hearing on habeas corpus.—The hearing should be had immediately upon the return of the writ;[54] but may be adjourned, under certain circumstances.[55] The party brought before the court or judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The proofs adduced on either side must be heard, and the attendance of witnesses may be compelled by subpœna and attachment.[56] An inquiry may be made outside the record, to ascertain whether in fact the confinement is on account of acts done in pursuance of a law of the United States, and under process from a judge of the same.[57] If the district court of appeals in bank cannot agree, the writ must be dismissed, and it will not be transferred to another district or to the supreme court as in other cases.[58] The functions of the writ, where the party appealing to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face.[59]

50 Ex parte Bennett, 2 Cranch C. C. 612, Fed. Cas. No. 1311. See, also, Ex parte Branigan, 19 Cal. 133; Ex parte Milburn, 9 Pet. 704, 9 L. Ed. 280.

51 People ex rel. Crouse v. Cowles, 4 Keyes, 38.

52 Ex parte Buckley, 105 Cal. 123, 38 Pac. 686.

53 Cal. Pen. Code, §§ 1382, 1387; In re Begerow, 136 Cal. 293, 68 Pac. 773, 56 L. R. A. 528.

54 Cal. Pen. Code, § 1483.

55 Cal. Pen. Code, § 1482. See, also, Ex parte Gibson, 31 Cal. 623, 91 Am. Dec. 546; Ex parte Ring, 28 Cal. 247.

56 See Cal. Pen. Code, § 1484.

57 Ex parte Jenkins, 1 Phil. 168, 2 Wall. Jr. 521, 2 Am. Law Reg. 144, Fed. Cas. No. 7259.

58 Ex parte Oates, 2 Cal. App. xiii, 83 Pac. 261; Sup. Ct. Rule 33, 78 Pac. xiii.

59 Ex parte McCullough, 35 Cal. 97; Ex parte Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; Ex parte Long, 114 Cal. 159, 45 Pac. 1057.

The court may proceed to inquire whether the indictment charges any offense known to the law.[60] But it is not competent to retry the issues of fact, or to review the proceedings of a legal trial.[61] Under the writ of *habeas corpus* it is not competent to determine whether or not the order of the court upon which the process was founded is or is not erroneous.[62] The remedy in such case is by *certiorari*.[63] The court has only to inquire whether a warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offense.[64] *Habeas corpus* is the proper remedy for every unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful, in the sense of this rule, merely because the process or order under which the party is held has been irregularly issued, or is erroneous.[65]

§ 2378. **Matters considered.**—The jurisdiction under which one is held for contempt can be inquired into, and defendant released, though the statute forbids the discharge of one held for contempt, upon *habeas corpus* proceedings.[66] The action of the state board of prison directors in annulling the good-behavior time allowance in an illegal manner may be reviewed by *habeas corpus*, and the prisoner discharged when he has served his time, less his good-behavior time allowance.[67] The right of an appointee to hold a legal office which can be filled by a *de facto* officer cannot be questioned in *habeas corpus* proceedings.[68]

Lack of jurisdiction can be taken advantage of by *habeas corpus*, as in cases where the statute is entirely void;[69] or the court

60 In re Corryell, 22 Cal. 178.

61 Ex parte Bird, 19 Cal. 130; Ex parte Cottrell, 59 Cal. 420; Ex parte Noble, 96 Cal. 362, 31 Pac. 224.

62 Ex parte McCullough, 35 Cal. 97; Ex parte Granice, 51 Cal. 375. See, also, State v. Kinmore, 54 Minn. 135, 40 Am. St. Rep. 305, 55 N. W. 830; Ex parte Mitchell, 104 Mo. 121, 24 Am. St. Rep. 324, 16 S. W. 118. That only jurisdictional defects are available on habeas corpus, see In re Morris, 39 Kan. 28, 7 Am. St. Rep. 512, 18 Pac. 171; In re Permstick, 3 Wash. 672, 28 Am. St. Rep. 80, 29 Pac. 350.

63 Matter of Place, 34 How. Pr. 259.

64 United States v. Johns, 4 Dall. 412, 1 L. Ed. 888. See Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; Ex parte Walpole, 85 Cal. 362, 24 Pac. 657; Ex parte Becker, 86 Cal. 402, 25 Pac. 9; Ex parte Palmer, 86 Cal. 631, 25 Pac. 130.

65 Ex parte McCullough, 35 Cal. 97.

66 In re Jewett, 69 Kan. 830, 77 Pac. 567; In re Norton, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639.

67 In re Knowlton, 136 Cal. 107, 68 Pac. 480.

68 Ex parte Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249.

69 Ex parte Kair, 28 Nev. 127, 113 Am. St. Rep. 817, 80 Pac. 463; Bandy

is claimed to have no legal existence;[70] or the judgment itself is void for any reason,[71] as where the charge made is not a public offense.[72]

§ 2379. Matters not considered.—Errors and irregularities occurring at the trial are not grounds for discharge of a defendant on *habeas corpus*,[73] nor any matters of defense.[74] The right of guardianship of a minor cannot be tried on *habeas corpus*.[75] A judgment sentencing a defendant to a shorter period of time than that specified by the statutes, though erroneous, is not void, and *habeas corpus* will not lie to release such person.[76] The question as to whether the applicant for the writ is the person named in the warrant cannot be considered on *habeas corpus* when there is no such question raised in the pleadings.[77] On *certiorari* issued in aid of a writ of *habeas corpus* examination of the sufficiency of the evidence cannot be had, but only the jurisdiction of the lower court over the matter and the parties.[78] Sufficiency of the evidence before the grand jury cannot be raised on *habeas corpus*,[79] but only jurisdictional questions,[80] or whether the judgment is void.[81]

§ 2380. Jurisdiction of the supreme court.—The supreme court is a court of original jurisdiction in a *habeas corpus* proceeding, and cannot review as upon appeal questions properly presented to the trial court on arraignment, or subsequent thereto.[82] It gets

v. Hahn, 10 Wyo. 167, 67 Pac. 979.

70 In re Norton, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639.

71 Hovey v. Sheffner, 16 Wyo. 254, 125 Am. St. Rep. 1037, 93 Pac. 305, 15 L. R. A. (N. S.) 227; In re McQuown, 19 Okla. 347, 91 Pac. 689, 11 L. R. A. (N. S.) 1136.

72 Ex parte Goldman (Cal. App.), 88 Pac. 819.

73 In re Lapique, 139 Cal. 204, 72 Pac. 995; Ex parte Terry, 71 Kan. 362, 80 Pac. 586; In re Downey, 31 Mont. 441, 78 Pac. 772; Ex parte Stacey, 45 Or. 85, 75 Pac. 1060; In re Casey, 27 Wash. 686, 68 Pac. 185; State v. Graham, 34 Wash. 81, 74 Pac. 1058; Smith v. Territory, 4 Ariz. 95, 78 Pac. 1035.

74 In re Myrtle, 2 Cal. App. 383, 84 Pac. 335.

75 Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787.

76 In re Reed, (In re O'Neill) 143 Cal. 634, 101 Am. St. Rep. 138, 77 Pac. 660; In re Nolan, 68 Kan. 796, 75 Pac. 1025.

77 Gillis v. Leekley, 38 Wash. 156, 80 Pac. 300.

78 In re Boyle, (State v. District Court) 26 Mont. 365, 68 Pac. 409.

79 In re Kennedy, 144 Cal. 634, 103 Am. St. Rep. 117, 78 Pac. 34, 67 L. R. A. 406.

80 In re Mahany, 29 Colo. 442, 68 Pac. 235.

81 Ex parte Stacey, 45 Or. 85, 75 Pac. 1060.

82 Ex parte Knudtson, 10 Idaho, 676, 79 Pac. 641.

its authority, generally, from the constitution, and not from statutes.[83] The supreme court will not interfere by *habeas corpus* to discharge a person indicted for a crime, until he has applied to the trial court for the appropriate relief.[84] If a single justice of the district court of appeals has remanded a prisoner on *habeas corpus*, a subsequent writ issued out of the supreme court must be made returnable before that court in bank.[85]

Appeal, and not *habeas corpus*, is the proper proceeding to test the constitutionality of a city ordinance on which prosecution is based in a justice's court.[86] But where the time for appeal has expired, defendant may challenge the constitutionality of a statute by writ of *habeas corpus* in the supreme court.[87] However, the writ may not be had for the purpose of reviewing a judgment based on a trial in a court of competent jurisdiction.[88]

§ 2381. Jurisdiction of the state courts.—The writ of *habeas corpus* may be issued and heard by the supreme court or any justice thereof, or by a superior court or any judge thereof.[89] It may be issued in term or vacation, and be heard before the court or a judge at chambers.[90] So in case of a party arrested as a fugitive from justice. But the court has no power to control the executive discretion in such cases. Yet that discretion may be inquired into in every case involving the liberty of the citizen.[91] Its allowance in term-time by the supreme court of California is in the discretion of the court.[92] The supreme court may exercise its appellate jurisdiction by means of this writ.[93] But, by the amendment to the constitution, it has original jurisdiction in the issuance of the writ.[94] The statute, in Kansas, prohibiting inquiry by *habeas corpus* into the legality of a final judgment of a court of competent jurisdiction refers to a court created by the constitution or act of legislature, and given jurisdiction over the subject-

83 Ex parte Moyer, 35 Colo. 154, 91 Pac. 738.

84 In re Dykes, 13 Okla. 339, 74 Pac. 506.

85 Ex parte Mogenson, 5 Cal. App. 596, 151 Cal. 517, 91 Pac. 334.

86 People v. District Court, 33 Colo. 328, 108 Am. St. Rep. 98, 80 Pac. 888.

87 In re Jarvis, 66 Kan. 329, 71 Pac. 576.

88 In re Clark, 28 Utah, 268, 78 Pac. 475.

89 See Cal. Pen. Code, § 1475.

90 See Cal. Pen. Code, § 1483; Cal. Code Civ. Proc., §§ 48, 76, 166.

91 In the Matter of Manchester, 5 Cal. 237.

92 Ex parte Ellis, 11 Cal. 222.

93 People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

94 Tyler v. Houghton, 25 Cal. 26.

matter, and which has acquired that jurisdiction.[95] A void judgment can be attacked by writ of *habeas corpus*,[96] but not a judgment which is merely voidable.[97] The writ cannot issue to persons outside of the court's district to bring within their district parties outside,[98] even though held there on judgment of conviction from the court issuing the writ.[99]

§ 2382. Jurisdiction, conflict of.—Where a person is properly in custody under state authority, the United States circuit court has no authority to take the accused by *habeas corpus* from such authority;[100] nor has a state court authority to remove a defendant from the custody of a court of the United States.[101] So in extradition cases, where a warrant has been issued by the secretary of state, and is in the hands of the United States marshal;[102] so also in cases of enlistment.[103] It cannot inquire into the validity of an enlistment in the case of desertion;[104] or where the prisoner is awaiting a trial before a court-martial.[105]

95 In re Norton, 64 Kan. 842, 91 Am. St. Rep. 255, 68 Pac. 639.

96 State v. District Court, 35 Mont. 321, 89 Pac. 63.

97 Martin v. District Court, 37 Colo. 119, 86 Pac. 85.

98 In re Jewett, 69 Kan. 830, 77 Pac. 567.

99 State v. District Court, 35 Mont. 51, 88 Pac. 564.

100 United States v. Rector, 5 McLean, 174, Fed. Cas. No. 16132. See, also, Ableman v. Booth, 21 How. 506, 16 L. Ed. 169; Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; Ex parte Skiles, 50 Fed. 524; Ex parte Ulrich, 43 Fed. 661.

101 United States v. Rector, 5 McLean, 174, Fed. Cas. No. 16132; Tarble's Case, 13 Wall. 397, 20 L. Ed. 597; Ableman v. Booth, 21 How. 506, 16 L. Ed. 169. See, also, Cal. Pen. Code, § 1486; Ex parte Le Bur, 49 Cal. 159.

102 In the Matter of Veremaitre, 9 N. Y. Leg. Obs. 137, Fed. Cas. No. 16115, 6 Op. Atty.-Gen. 103, 713. See, as to the power of United States courts in such cases, Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12968; In re Kaine, 10 N. Y. Leg. Obs. 257, 14 How. 103, 14 L. Ed. 345; Robb v. Connolly, 111 U. S. 624, 28 L. Ed. 542, 4 Sup. Ct. 544; overruling Ex parte Robb, 64 Cal. 431, 1 Pac. 881.

103 Matter of O'Connor, 48 Barb. 258, 3 Abb. Pr. (N. S.) 137; Reilly's Case, 2 Abb. Pr. (N. S.) 334; People v. Gaul, 44 Barb. 98; Matter of Martin, 45 Barb. 142. As to issuance of writ in cases of enlisted soldiers, and of the authority of state courts in the issuance of the writ of habeas corpus in such cases, consult Matter of Barrett, 42 Barb. 479; Matter of Graham, 8 Jones, L. 416; Matter of Bryan, 1 Winst. (N. C.) No. 1; Matter of Rosenan, 1 Winst. (N. C.) 443. As to issuance of writ in favor of Chinese persons, see In re Chin Yuen Sing, 65 Fed. 572; United States v. Chung Shee, 71 Fed. 277; affirmed, 76 Fed. 951, 22 C. C. A. 639.

104 See above cases; also, Ex parte Anderson, 16 Iowa, 595.

105 Matter of Beswick, 25 How. Pr. 149.

§ 2383. **Practice.**—The proceedings on a writ of *habeas corpus* in the federal courts are governed by the common law of England as it stood at the adoption of the constitution, subject to such alterations as Congress shall see fit to prescribe, and not by the state statutes.[106] So in cases of aliens.[107] A petitioner for a writ of *habeas corpus* is not entitled to a jury to try issues of fact.[108] Upon a return of *habeas corpus* in a case of arrest upon suspicion and without a warrant, proof must be given to show the suspicion to be well founded.[109]

§ 2384. **Extradition.**—A petitioner in extradition, not appearing to be a fugitive from justice, is entitled to discharge on writ of *habeas corpus*.[110] Where the accused is within the jurisdiction of the demanding state, he cannot raise the question as to whether or not he is a refugee from the justice of that state.[111]

§ 2385. **Custody of infants.**—Where the legal rights of the parents are not clear, the best interests of the child will govern,[112] and the minor may be examined as to its wishes. The statute giving a father prior right to the guardianship of his children is merely directory, and the question of custody is governed by the law of the forum, irrespective of the law of the domicile.[113] The right to guardianship of a minor cannot be tried in *habeas corpus* proceedings, but only the right of custody.[114]

§ 2386. **Rearrest.**—No person who has been discharged by order of the court or judge upon *habeas corpus* can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases: 1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense by legal order or process; 2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or

106 Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7597.

107 Matter of Barry, 7 Law Rep. 374.

108 Baker v. Gordon, 23 Ind. 204.

109 2 Inst. 52; In re Henry, 29 How. Pr. 185.

110 Poor v. Cudihee, 37 Wash. 609, 79 Pac. 1105.

111 Ex parte Moyer, 12 Idaho, 250, 118 Am. St. Rep. 214, 85 Pac. 897; Ex parte Pettibone, 12 Idaho, 264, 85 Pac. 902.

112 Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787.

113 Tytler v. Tytler, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1.

114 Andrino v. Yates, 12 Idaho, 618, 87 Pac. 787.

commitment in a criminal case, the prisoner is again arrested, on sufficient proof, and committed by legal process for the same offense.[115] But former jeopardy, being a defense, cannot ordinarily be raised on *habeas corpus*.[116]

§ 2387. **Refusal to grant, etc.**—If any judge, after a proper application is made, refuses to grant an order for a writ of *habeas corpus*, or if the officer or person to whom such writ may be directed refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction.[117]

§ 2388. **Dismissal on return.**—If it appears that respondent gave aid to a fifteen-year-old boy from motives of humanity only, and such boy voluntarily left his father and went to Honolulu on invitation of his sister, he should be discharged and the writ dismissed.[118] If the court in bank cannot agree, the writ must be dismissed.[119]

§ 2389. **Remanded.**—The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody—1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.[120] Where a commitment under a charge for murder was insufficient, because it failed to state the name of the person alleged to have been murdered, or that the name of such person was unknown, it was held that these defects did not entitle the petitioner to be discharged.[121] Informality in the commitment will not justify a

115 Cal. Pen. Code, § 1496. See In re Crow, 60 Wis. 349, 19 N. W. 713; Ex parte Jilz, 64 Mo. 205, 27 Am. Rep. 218; United States v. Chung Shee, 76 Fed. 951, 22 C. C. A. 639.

116 Ex parte Collins, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

117 Cal. Pen. Code, § 1505.

118 In re Christal, 141 Cal. 523, 75 Pac. 103.

119 Ex parte Oates, 2 Cal. App. xiii, 83 Pac. 261.

120 Cal. Pen. Code, § 1486.

121 Ex parte Bull, 42 Cal. 199. See, also, People v. Smith, 1 Cal. 9; Ex parte Bird, 19 Cal. 131; Ex parte Gibson, 31 Cal. 623, 91 Am. Dec. 546; Ex parte Ring, 28 Cal. 247; Ex parte Murray, 43 Cal. 455; Cal. Pen. Code, §§ 1492-1494.

discharge on *habeas corpus,* when it is in the power of the petitioner for the writ to produce the record, and he fails to do so.[122]

§ 2390. Return of writ.—A writ requires a return by the person having jurisdiction of the prisoner.[123] Upon a return to a writ of *habeas corpus,* it is proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.[124] A return that the person alleged to be detained was not within the control and custody of the party to whom the writ was directed, and that such person was beyond the jurisdiction of the court, was held evasive and insufficient where such person had been removed in anticipation of the issuance of the writ.[125] Attachment for not returning is not issued until three days after service of the writ.[126] In Nevada, the warden of the state prison may show that he holds the prisoner not only by the virtue of a commitment, but also under sentence of the court.[127] Where the custody is allowed to remain in defendant after return of the writ and pending final decision, such detention is by authority of the court issuing the writ, or to which the return is made, and not under the original restraint.[128] Upon filing the return, the petition is treated as a traverse to it, and if the matters in the petition so treated are denied, it is incumbent upon the person to whom the writ is addressed to join issue upon them; otherwise, the facts stated in the petition will be taken as true.[129] It is immaterial when the officer got his authority to hold petitioner, just so that he got it before making the return, and such authority appears in the return.[130] It is an unanswerable return to a writ of *habeas corpus* that the court had jurisdiction in which the action was pending, and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its powers, or to set it aside if erroneously issued.[131]

122 Fleming v. Bills, 3 Or. 286.

123 Ex parte Collins, 151 Cal. 340, 90 Pac. 827.

124 People v. Smith, 1 Cal. 9.

125 United States v. Davis, 5 Cranch C. C. 373, Fed. Cas. No. 14926.

126 United States v. Bollman, 1 Cranch C. C. 622, Fed. Cas. No. 14622.

127 Ex parte Salge, 1 Nev. 449.

128 In re Grant, 26 Wash. 412, 67 Pac. 73.

129 In re Smith, 143 Cal. 368, 77 Pac. 180.

130 Ex parte Dye, 32 Mont. 132, 79 Pac. 689.

131 Barton v. Saunders, 16 Or. 51, 8 Am. St. Rep. 261, 16 Pac. 921. See, as to sufficiency of return, Rich

§ 2391. **Warrant.**—Where it appears that any one is illegally held in custody, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of *habeas corpus*, can be enforced, a warrant may be issued reciting the facts, and directed to the sheriff, coroner, or constable of the county, commanding him to take the person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.[132]

§ 2392. **Answer to return.**—The petitioner may present exceptions to the return raising questions of law, or a traverse raising issues of fact, or both, and the burden of proving the new facts set out in the petitioner's traverse is upon the petitioner.[133]

§ 2393. **Writ, form of.**—The writ must be issued by the clerk, and bear the seal of the court.[134] It must be returned before the judge (when issued by a judge) at the county seat, and there be heard and determined.[135] A writ issued upon application made to the supreme court for the release of a sane person detained in an asylum, should be made returnable before the judge of a certain superior court for hearing as to the applicant's sanity.[136] It may be issued and served on any day, at any time.[137]

§ 2394. **Who may issue writ.**—The courts of the United States are empowered to issue the writ of *habeas corpus*.[138] Any of the justices of the supreme court of the United States, as well as a judge of any United States district or circuit court, may issue the writ.[139] In cases removed from state courts against a person denied civil rights, when such person is in actual custody under process issued by the state court, a writ of *habeas corpus cum causa* must be issued by the clerk and delivered to the marshal.[140]

ards v. Collins, 45 N. J. Eq. 283, 14 Am. St. Rep. 726, 17 Atl. 831; In re Klein, 39 N. Y. St. Rep. 873.

132 Cal. Pen. Code, § 1497.

133 Ex parte Collins, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

134 Cal. Pen. Code, § 1503.

135 Cal. Pen. Code, § 1504.

136 Ex parte Clary, 149 Cal. 732, 87 Pac. 580.

137 Cal. Pen. Code, § 1502.

138 U. S. Rev. Stats., § 751; U. S. Comp. Stats. 1901, p. 592.

139 U. S. Rev. Stats., § 752; U. S. Comp. Stats. 1901, p. 592.

140 U. S. Rev. Stats., § 642; U. S. Comp. Stats. 1901, p. 521. In cases against revenue officers, and officers acting under registration laws, see U. S. Rev. Stats., § 643, U. S. Comp. Stats. 1901, p. 521. For proceedings generally in habeas corpus cases in

§ 2395. Issuance of writ.—The writ should not issue to run out of the county, unless for good cause shown, as the absence, refusal, or disability of the judge to act, or other reason, showing that the object and reason of the law requires its issuance. In such case, resort may be had to officers out of the county.[141] Though the writ is a writ of right, it is not granted of course, but upon probable cause shown.[142] The act of issuing the writ is purely ministerial, and in no sense judicial.[143] The allowance or refusal is a matter of law, and not of discretion.[144] A writ will not be granted if it appears from the application, *prima facie*, that there is not sufficient ground for the discharge of the party imprisoned.[145]

§ 2396. Appeal.—*Habeas corpus* proceedings are triable *de novo* upon appeal,[146] unless brought on writ of error.[147] A *habeas*

the United States courts, see U. S. Rev. Stats., §§ 751-766, U. S. Comp. Stats. 1901, pp. 592, 597. That territorial courts may grant writs, see U. S. Rev. Stats., § 1912. For various questions relating to this writ, consult Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12968; Matter of Keeler, Hempst. 306, Fed. Cas. No. 7637; Ex parte Des Rochers, 1 McAll. 68, Fed. Cas. No. 3824; United States v. Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch, 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch, 75, 2 L. Ed. 554; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Milburn, 9 Pet. 704, 9 L. Ed. 280; Matter of Metzger, 5 How. 176, 12 L. Ed. 104; Ex parte Hung Hang, 108 U. S. 552, 27 L. Ed. 811, 2 Sup. Ct. 863; Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715; Wales v. Whitney, 114 U. S. 564, 29 L. Ed. 277, 5 Sup. Ct. 1050; Benson v. McMahon, 127 U. S. 457, 32 L. Ed. 234, 8 Sup. Ct. 1240; Ex parte Cuddy, 131 U. S. 280, 33 L. Ed. 154, 9 Sup. Ct. 703. As to power of circuit courts, see Ex parte Milligan, 4 Wall. 3, 18 L. Ed. 281; Ex parte Smith, 3 McLean, 121, Fed. Cas. No. 12968. As to power of justice in vacation, see Matter of Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Barnes, Sprague, 133, Fed. Cas. No. 1010.

141 Ex parte Ellis, 11 Cal. 222.

142 United States v. Lawrence, 4 Cranch C. C. 518, Fed. Cas. No. 15577; Matter of Keeler, Hempst. 307, Fed. Cas. No. 7637; Ex parte Vallandigham (Trial of Vallandigham), 259, Fed. Cas. No. 16816; Ex parte Davis, 14 Law Rep. (N. S.) 301, Fed Cas. No. 3613. See Ex parte Murray, 66 Fed. 297; Ex parte Terry, 128 U. S. 301, 32 L. Ed. 405, 9 Sup. Ct. 77. As to when issuance will be refused, see Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; Sim's Case, 7 Cush. 285; Hurd on Habeas Corpus, 223; Ex parte Vallandigham (Trial of Vallandigham), 259, Fed. Cas. No. 16816.

143 People v. Nash, 5 Park. Cr. Rep. 473; Nash v. People, 36 N. Y. 607; Matter of Nash, 16 Abb. Pr. 281. But to the contrary is People v. Russell, 1 Abb. Pr. (N. S.) 230.

144 Ex parte Milligan, 4 Wall. 3, 18 L. Ed. 281.

145 In re Griner, 16 Wis. 423.

146 Spencer v. Kees, 47 Wash. 276, 91 Pac. 963.

147 Tytler v. Tytler, 15 Wyo. 319, 123 Am. St. Rep. 1067, 89 Pac. 1.

corpus proceeding is civil, and an order for discharge of the prisoner is appealable;[148] and such appeal does not suspend prosecution of the information.[149] The supreme court may on *certiorari*, review a judgment in a *habeas corpus* proceeding, whether it be civil or criminal.[150] The writ of error does not stay proceedings in the lower court.[151] An order discharging the prisoner is not of such final character as to be appealable.[152]

FORMS IN HABEAS CORPUS.

§ 2397. Petition for writ of habeas corpus by third person on behalf of the prisoner.

Form No. 645.

To the . . . Court of . . . County, State of . . . :

The petition of C. D., of the city of . . . , county of . . . , and state of . . . , who makes and verifies this petition on behalf of A. B., of . . . , in said county, respectfully shows that said A. B. is imprisoned and restrained of his liberty by L. M. at [name place of confinement], in said county; that said A. B. is not committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or order; that the cause or pretense of such confinement or restraint, according to the knowledge and belief of said A. B., is [here state the cause, and if it be any judicial process or warrant, name the alleged offense, and attach a copy of the process or warrant saying: a copy whereof is hereto annexed marked Exhibit A. Or if a copy could not be obtained, say: that by reason of said A. B. being removed or concealed before this application, a demand for a copy of said process or warrant could not be made; or that a demand for a copy of said warrant or process was made by your petitioner of said L. M., before this application, and the legal fees therefor tendered to said L. M., and that such copy was refused].

148 Garfinkle v. Sullivan, 37 Wash. 650, 80 Pac. 188.

149 State v. Fenton, 30 Wash. 325, 70 Pac. 741.

150 Martin v. District Court, 37 Colo. 110, 119 Am. St. Rep. 262, 86 Pac. 82; Colo. Const., art. 6, § 3.

151 Ruef v. Superior Court, 150 Cal. 657, 89 Pac. 604.

152 Ex parte White, 2 Cal. App. 726, 84 Pac. 242. Contra, see Winnovich v. Emery, 33 Utah, 345, 93 Pac. 988.

[If the cause of confinement be unknown, insert instead of the foregoing:] That said A. B. is utterly ignorant of the cause or pretense of such confinement or restraint, and is unable to ascertain the same;

That the confinement of said A. B. is illegal in this [here state particularly in what respect the confinement is illegal].

[If application is made in another county from that where the prisoner is detained, add:] That there is no officer in the said . . . county authorized to grant said writ [except R. S., judge, etc., and that he is now absent from said county, or has refused to grant said writ, or is incapable of acting on account of illness].

Your petitioner therefore prays that a writ of *habeas corpus* may issue, directed to the said L. M., commanding him that he have the body of the said A. B., by him imprisoned and detained, together with the time and cause of such imprisonment and detention, before the said court [or, officer, naming him], to do and receive what shall then and there be considered concerning the said A. B. in pursuance of the statute in such case provided.

Dated this . . . day of . . . , 19..

[Add verification.]

§ 2398. Affidavit for writ of habeas corpus ad testificandum.

Form No. 646.

[TITLE OF ACTION.]

[VENUE.]

A. B., being duly sworn, says:

That he is the plaintiff in the above-entitled action, which is brought by him to recover upon a certain promissory note executed by the defendant [describing it; or, otherwise, state the nature of the action].

That the defense in said action is [state nature of defense].

That the affiant has fully and fairly stated the case to his attorney, E. F., Esq., who resides at . . . , and also the facts which he expects to prove by one A. B.; and that he is advised by said counsel, and verily believes, that the testimony of the said A. B. is material and necessary for him upon the trial of this action, without which he cannot safely go to trial.

That the said A. B. is now a prisoner in the custody of L. M., sheriff of . . . county, and confined in the jail of said county, at . . . ; and that, as affiant is informed and believes, the cause of his detention and confinement is [state same].

That this cause is on the calendar for trial at the present term of this court, and that this application is made in good faith to procure the attendance of said witness on said trial and without collusion between affiant and said A. B.

[JURAT.] A. G.

[Allowance to be indorsed:] Upon the within affidavit let the writ of *habeas corpus ad testificandum* be issued.

[DATE.] J. K., Judge.

§ 2399. Petition where petitioner may be carried out of state or suffer irreparable injury before writ can issue.

Form No. 647.

And your petitioner further shows:

That the said L. M., in whose custody the said A. B. is, has threatened to carry the said A. B. out of this state, and has told several persons publicly that such was his intention.

That your petitioner had a conversation with said L. M. this morning, in which he informed your petitioner that he should leave immediately with said A. B. for the state of . . . , and that neither your petitioner nor any other person had power to prevent him from doing so, and your petitioner fears that he [or, name prisoner] will be carried out of the state by said L. M. [or, will suffer some irreparable injury] before he can be relieved by proceeding by *habeas corpus*.

Wherefore, your petitioner prays that a warrant be issued to take your petitioner [or, said prisoner], [and to arrest said L. M.] and forthwith to bring him [or, them] before this court [or, before you], to be dealt with according to law.

[VERIFICATION.] A. B.

[Add corroborating affidavits, if possible.]

§ 2400. Warrant on foregoing petition.

Form No. 648.

The State of . . . to S. F., Sheriff of the County of . . . [or, to any constable of the county of . . . , or any other person].

Whereas, A. B. has applied to me [or, to the court] for a warrant to take A. B., alleged to be illegally confined by [or, in the custody of] L. M.

And whereas, it appears from the proofs before me on such application, that, etc. [Recite the facts.]

And whereas, it satisfactorily appears to me [or, to the court] that the said A. B. is held in illegal confinement or custody by the said L. M., and that there is good reason to believe that he will be carried out of the state [or, that he will suffer some irreparable injury] before he can be relieved by the issuing of a *habeas corpus:*

Now, therefore, you are authorized and commanded, forthwith to arrest the said L. M., and to take the body of the said A. B., and to bring them immediately before me at my office [or, before this court, at the courthouse] in the city of . . . , in said county, to be dealt with according to law.

Given under my hand and seal, at . . . , in said county, this . . . day of . . . , 19..

[SEAL.] J. K., Judge, etc.

§ 2401. Preliminary writ, issued when irreparable injury would be suffered before relief by habeas corpus.

Form No. 649.

The State of . . . to the Sheriff of . . . County [or, such other person as is named by the court], greeting:

Whereas, A. B. has applied to me for a writ of *habeas corpus* to inquire into the detention of A. B., alleged to be illegally restrained of his liberty by L. M. at [name place of confinement].

And whereas, it satisfactorily appears to me that the said A. B. will suffer irreparable injury before he can be relieved by issuing the ordinary writ of *habeas corpus:*

You are therefore hereby commanded, that you forthwith take the said A. B. and bring him before me to be dealt with according to law.

[If it satisfactorily appears that the person detaining the prisoner has committed a crime in connection with the illegal detention, add:] And whereas, it further satisfactorily appears to me that the said L. M. has committed the crime of [name the offense], in connection with the illegal detention of the said A. B.:

You are therefore hereby commanded forthwith to arrest the said L. M. and bring him before me to be dealt with according to law, and have you then and there this writ, with a return hereon of your doings in the premises.

Witness my hand, this . . . day of . . . , 19..

J. K., Judge, etc.

§ 2402. Petition for writ.

Form No. 650.

In the Matter of the Application of . . . , for a Writ of Habeas Corpus.

To the Hon. . . . , Judge of the Superior Court of the State of . . . , in and for the . . . County of . . .

The petition of . . . respectfully shows:

That . . . is unlawfully imprisoned, detained, confined, and restrained of his liberty by . . . , at . . . , in the . . . county of . . . , in the state of . . .

That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit: [State what.]

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said . . . , commanding him to have the body of . . . before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of . . . detention, and said writ; and that he may be restored to his liberty.

Dated on the . . . day of . . . , 19..

[ORDINARY VERIFICATION.] [SIGNATURE.]

§ 2403. Order granting writ.

Form No. 651.

[TITLE.]

On reading and filing the petition of . . . , duly signed and verified by him, whereby it appears that he is illegally imprisoned and restrained of his liberty by . . . , at the . . . , in the . . . county of . . . , in the state of . . . , and stating wherein the illegality consists, from which it appears to me that a writ of *habeas corpus* ought to issue:

It is ordered that a writ of *habeas corpus* issue out of and under the seal of the superior court of the state of . . . , in and for the . . . county of . . . , directed to the said . . . , commanding him to have the body of the said . . . before me, in the courtroom of the said court, on the . . . day of . . . , 19.., at . . . o'clock A. M. of that day, to do and receive what shall then and there

be considered concerning the said . . ., together with the time and cause of his detention, and that he have then and there the said writ.

Dated on the . . . day of . . ., 19..

P. Q., Judge, etc.

§ 2404. Writ of habeas corpus.

Form No. 652.

[TITLE.]

[VENUE.]

The People of the State of California, to A. B., greeting:

We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said C. D. shall be called or charged, before G. H., judge of the superior court of the state of California, in and for the county of . . ., at the courtroom of the said court, in and for the city and county of San Francisco, on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon of that day, to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

Witness, Hon. . . ., judge of the said court, at the courtroom thereof, in the city and county of San Francisco, this . . . day of . . ., 19..

Attest, my hand and the seal of the said court, the day and year last above written. K. L., Clerk.

By O. P., Deputy Clerk.

§ 2405. Return to writ, alleging custody under process.

Form No. 653.

[VENUE.]

The return of L. M., Sheriff of the County of . . . to the writ of *habeas corpus* hereto annexed.

In obedience to the writ of *habeas corpus* hereto annexed, I do hereby certify and return to the . . . court [or, officer allowing the writ], that before the coming to me of the within writ, the said A. B. was committed to my custody [or, was arrested by me], and is detained by virtue of an order of arrest [or, otherwise, designate the warrant according to the fact], to me directed, a copy of which annexed I transmit to you. Nevertheless, I shall

have the body of said A. B. before you at the day and place within mentioned, as I am within commanded.

[DATE.] L. M., Sheriff, etc.

§ 2406. Return to writ, denying custody.

Form No. 654.

[VENUE.]

The return of L. M., Sheriff of the County of . . ., to the writ of *habeas corpus* hereto annexed.

In obedience to the writ of *habeas corpus* hereto annexed, I do hereby certify and return to the . . . court [or, officer allowing the writ], that neither at the time of the allowance of the said writ, nor at any time since, was the said A. B., therein mentioned, by whatever name he may be called, in my custody, possession, or power, or restrained by me of his liberty; wherefore, I cannot have his body before you, as by the said writ I am commanded.

[DATE.] L. M., Sheriff, etc.

[If the person making the return is not a sworn public officer, add verification.]

§ 2407. Traverse of return to writ.

Form No. 655.

[TITLE.]

A. B., by this his answer to the return of L. M., sheriff of the county of . . ., denies [or, alleges], etc. [Here set forth matter in answer to the return.]

[Add verification.] A. B.

§ 2408. Notice, to party interested, of time and place of return of writ.

Form No. 656.

STATE OF . . .
. . . COURT, . . . COUNTY.

The state of . . ., on the relation of A. B., Plaintiff,
v.
L. M., Defendant.

[Or, if before a judge, omit name of court, and say: Before Hon. J. K., Judge, etc.]

Take notice, that a writ of *habeas corpus* has been issued by [designating the court or officer] to inquire into the cause of the

ent or restraint of A. B., now confined [in the jail of y, under process], in which you have, or claim, [or, the has, or claims], some interest; and that the said writ urnable before the said court [or, officer], at the court- at his office] in . . . , on the . . . day of . . . instant, clock in the . . . noon, [and that the application will on the writ and return thereto before said court, [or, the courthouse, [or, at his office,] in . . . , on the . . .]. G. H., Attorney for Relator.

to the party in interest, or to his attorney, if he

9. Order that prisoner be admitted to bail.

Form No. 657.

[TITLE.]

It appearing on the return of the writ of *habeas corpus* allowed by me [or, by this court] that A. B. is detained in the custody of the sheriff of the county of . . . , under a commitment in which the said A. B. is charged with the offense of [grand larceny]; and that the said A. B. is entitled to bail:

It is therefore ordered, that the said A. B. be held to bail for his appearance at the next term of the . . . court, to be held in and for the county of . . . , in the sum of . . . dollars.

And it is further ordered, that upon such bail being forthwith entered into, in conformity to this order and the provisions of law, that the said A. B. be discharged, and in default of such bail that he be remanded to the custody of said sheriff.

Witness, etc.

§ 2410. Recognizance or bail-bond.

Form No. 658.

[TITLE.]

[VENUE.]

Be it remembered, that on the . . . day of . . . , 19.., A. B., of . . . , in said county, and E. F., farmer, and G. H., merchant, of the same place, personally appeared before [naming officer], and severally and respectively acknowledged themselves to be indebted to the state of . . . in the sum of . . . dollars, to be levied of their respective goods and chattels, lands and tenements,

to the use of the said people, if default shall be made in the condition following:

Whereas, the above named A. B. is in the custody of the sheriff of said county, under a commitment from [name officer], from which commitment it appears that the said A. B. is charged with the crime of [grand larceny], committed within said county:

Now, therefore, the condition of this recognizance is such, that if the said A. B. shall personally appear at the next term of the . . . court, to be held in and for said county of . . . , then and there to answer to an indictment [or, information] to be preferred against him for the said offense, and further to do and receive what shall, by the said court, be then and there enjoined upon him, and shall not depart the said court without leave; then this recognizance to be void; otherwise, to remain in full force and virtue.

A. B. [SEAL.]
E. F. [SEAL.]
G. H. [SEAL.]

[Add justification of sureties.]

§ 2411. Order remanding prisoner.

Form No. 659.

[TITLE.]

It appearing, on the return of the writ of *habeas corpus* allowed by me [or, by this court], that A. B. is legally detained in custody, by virtue of an execution issued upon a final judgment rendered in the . . . court in favor of A. G., as plaintiff, against the said A. B., as defendant, [or, by virtue of a commitment for a contempt issued by the . . . court, in which commitment the said contempt is specially and plainly charged, the said court having authority to commit for the contempt so charged; or, otherwise, according to the statute]:

Ordered, that the said A. B. be and he is hereby remanded to his former imprisonment under the execution [or, commitment] aforesaid.

Witness, Hon. J. K., judge of said court, this . . . day of . . . , 19..

[SEAL.]

[Signature of clerk; or, if the proceeding be before a judge out of court, signature of judge.]

[Address to sheriff or other officer having custody of the prisoner.]

§ 2412. Order of discharge from imprisonment.

Form No. 660.

[TITLE.]

It appearing on the return of the writ of *habeas corpus* allowed by me [or, by this court], that A. B. is illegally imprisoned [or, detained] by you, [here may be stated in the words of the statute the class of cases in which a discharge is allowed]:

You are therefore hereby commanded, [or, I do therefore command you] forthwith to discharge him from your custody.

Witness, Hon. J. K., judge of said court, this . . . day of . . ., 19..

[SEAL.]

[Signature of clerk; or, if the proceeding be before a judge out of court, signature of judge.]

[Address to sheriff or other officer having custody of the prisoner.]

§ 2413. Attachment for disobedience to writ of habeas corpus.

Form No. 661.

[TITLE.]

The State of . . . to the Sheriff of the County of . . ., greeting:

It appearing satisfactorily to me [or, to the court], by sworn proof, that L. M., to whom a writ of *habeas corpus* was directed and delivered, commanding him to bring before me [or the . . . court] A. B., in the said writ named, has neglected [or, refused] to obey the said writ, according to the command thereof, by not producing the said A. B. before me, and also by not making a return [or, and full and explicit return] to such writ within the time limited by law; and no sufficient excuse having been shown for such neglect [or, refusal]:

Now, therefore, you are authorized and commanded, forthwith to arrest the said L. M., and to bring him immediately before me at my office, in the village of . . ., in said county, [or, before this court, at the courthouse, in . . .].

Witness, etc.

§ 2414. Commitment for disobedience to writ.

Form No. 662.

The State of . . . to the Sheriff of the County of . . ., greeting:

Whereas, L. M. has been brought before me [or, this court], on

a warrant issued by me [or, the court], stating that the said L. M. [etc., reciting its substance].

And whereas, the said L. M. still refuses to obey the said writ of *habeas corpus*, by producing the body [or, by certifying the day and cause of the imprisonment] of the said A. B., as therein required, and by not making a return [or, a full and explicit return] to such writ of *habeas corpus:*

Now, therefore, you are authorized and commanded, forthwith to convey the said L. M. to the jail of said county, and there commit him to close custody in such jail, there to remain until he shall make return to the writ in such warrant mentioned [and also comply with the order this day made,—if any, designating].

Witness, etc.

CHAPTER LXXXIV.

CONTEMPT OF COURT.

§ 2415. In general.—Contempt is a willful disregard or disobedience of a public authority. Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings.[1] In California, the statute enumerates certain acts and omissions which are declared to be contempts of the authority of the court.[2] Any judicial officer may punish for contempt in the cases provided for in the code.[3] If a court having jurisdiction should issue an erroneous order, a disobedience of it is a contempt.[4] An attorney who advises a course which results in contempt is himself guilty of contempt.[5] Any publication pending a suit, reflecting either upon the court, the jury, the parties, the counsel, etc., with reference to the suit, or tending to influence the decision of the cause, though not aspersive of the court, is a contempt.[6] Abuse of trial judge in a brief filed in the appellate court will be treated as contempt of the latter court.[7] To call another a liar in the presence of the court, and in the hearing of its officers, is a contempt. Violent language and an assault made

1 Bouv. Law. Dict. See Matter of Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755.

2 Code Civ. Proc., §§ 1209, 1210. See Ex parte Abbott, 94 Cal. 333, 29 Pac. 622.

3 Cal. Code Civ. Proc., § 178.

4 In re Cohen, 5 Cal. 494. See Batchelder v. Moore, 42 Cal. 412. But that a party cannot be punished for a contempt in violating a void or unlawful order, see Brown v. Moore, 61 Cal. 432; Ex parte Brown, 97 Cal. 83, 31 Pac. 840. See, also, State v. Ball, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975; Gordon v. Buckles, 92 Cal. 481, 28 Pac. 490; Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649; State v. Davis, 2 N. Dak. 474, 51 N. W. 492.

5 People v. District Court, 29 Colo. 182, 68 Pac. 242.

6 Hollingsworth v. Duane, Wall. C. C. 100, Fed. Cas. No. 6616. See United States v. Duane, Wall. C. C. 102, Fed. Cas. No. 14997. As to order to execute a release or conveyance, see Morris v. Walsh, 9 Bosw. 636. The above is an early authority, and will hardly stand the test of the more recent and more liberal decisions. See Ex parte Barry, 85 Cal. 603, 20 Am. St. Rep. 248, 25 Pac. 256; Dailey v. Superior Court, 112 Cal. 94, 53 Am. St. Rep. 160, 44 Pac. 458, 32 L. R. A. 273.

7 Sears v. Starbird, 75 Cal. 91, 7 Am. St. Rep. 123, 16 Pac. 531. See Friedlander v. Sumner Gold etc. Min. Co., 61 Cal. 116.

in a hall adjoining a courtroom, and within the hearing of the court, it then being in session, is a contempt, which the court may punish, within the meaning of the act.[8] When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in presence of the court, the facts must be shown by affidavits, or by a statement by the referees or arbitrators, or other judicial officer.[9] Acts committed in the grand jury room are not in presence of the court.[9a]

When the contempt is not committed in the view and presence of the court a warrant of attachment may be issued, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer or such notice or order to show cause.[10] Whenever a warrant of attachment is issued, the court or judge must direct, by an indorsement thereon, that the person named may be let to bail for his appearance, in a sum named in such indorsement.[11] When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear the answer, and witnesses may be examined for and against him, and adjournments may be had from time to time if necessary. Whether the person is guilty of the contempt charged must be determined from the answer and evidence taken, and, if adjudged guilty, he may be fined in a sum not exceeding five hundred dollars, or imprisoned not exceeding five days, or both.[12] When the contempt consists in the omission of an act which is yet in the power of the

8 United States v. Emerson, 4 Cranch C. C. 188, Fed. Cas. No. 15050.

9 Cal. Code Civ. Proc., § 1211.

9a Ex parte Hedden, 29 Nev. 353, 90 Pac. 737.

10 Cal. Code Civ. Proc., § 1212. See, also, Alaska Codes, pt. 4, ch. 58, §§ 609-623; Ariz. Civ. Code, pars. 1430, 1723, 1724, 2760, 2761; Idaho Rev. Codes, §§ 5155-5168; Mont. Rev. Codes, § 7309; Nev. Comp. Laws, §§ 121, 146, 151; Or. B. & C. Codes, § 665; Utah Rev. Stats., §§ 3361, 3362; Wash. Bal. Codes, §§ 5800-5811; Wyo. Rev. Stats., §§ 3694-3696, 3850, 4016, 4474, 4500.

11 Cal. Code Civ. Proc., § 1213. As to service of the warrant, letting to bail, condition of the undertaking, etc.; see Cal. Code Civ. Proc., §§ 1214-1216.

12 Cal. Code Civ. Proc., §§ 1217, 1218.

person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.[13] The use of profanity by witnesses before a referee may be punished as a contempt of court.[14]

§ 2416. **Title of proceedings.**—In absence of a statute regulating the entitling of contempt proceedings, they may be brought on the relation of a party or in the name of the state; it is the better practice to entitle them in the cause out of which the contempt arises.[15] That the proceedings prior to order of attachment against defendant were not in the name of the territory is immaterial.[16]

§ 2417. **Affidavit.**—It is essential to the validity of proceedings in contempt, whereby a person is subjected to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized; for mere intendments and presumptions will not be indulged in their support; and if the affidavit be defective in stating the facts, it is equivalent to no affidavit.[17] The jurisdiction of a court to adjudge a contempt committed out of its presence does not depend upon the form of the affidavit which sets the proceeding in motion. When the order to show cause is served, the defendant can appear and answer any contempt alleged against him.[18]

The lack of an allegation in the affidavit in contempt proceedings for failure to obey an order of the court requiring payment

[13] Cal. Code Civ. Proc., § 1219. For enumeration of contempts, consult Cal. Code Civ. Proc., §§ 1000, 1209, 1210, 1991; Tomlin's Law Dict.; Ruff v. Rader, 2 Mont. 211; State v. District Court, 13 Mont. 347, 34 Pac. 39; State v. Kaiser, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584; Territory v. Murray, 7 Mont. 251, 15 Pac. 145; In re MacKnight, 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.

[14] In re Haldorn, 10 Mont. 222, 25 Pac. 101. That to obtain an opinion of the court affecting the rights of persons, not parties to the pretended controversy, would be punishable as a contempt, see Lord v. Veazie, 8 How. 251, 12 L. Ed. 1067; Cleveland v. Chamberlain, 1 Black, 419, 17 L. Ed. 93. That the clerk may have an attachment for non-payment of his fees, see Lee v. Patterson, 2 Cranch C. C. 199, Fed. Cas. No. 8198.

[15] Porter v. State, 16 Wyo. 131, 92 Pac. 385.

[16] Hughes v. Territory, 10 Ariz. 119, 85 Pac. 1058.

[17] Batchelder v. Moore, 42 Cal. 412. As to sufficiency of affidavit, see Ex parte Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; Hedges v. Superior Court, 67 Cal. 405, 7 Pac. 767; Ex parte Acock, 84 Cal. 50, 23 Pac. 1029; State v. Canutt, 26 Wash. 68, 66 Pac. 130.

[18] Golden Gate etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

of the judgment, of the service of the order on the party, and that a demand for the payment of the sum awarded had been made, is cured by the answer admitting the issuance of such order.[19]

§ 2418. Commitment should state what.—A commitment for contempt for refusing to obey an order of court, commanding the imprisonment of the party in contempt until he shall comply with the order, should set forth that it is in the power of the party to comply.[20] Though courts are exclusive judges of their own contempts, still a party cannot be imprisoned for neglecting or refusing to do what appears to be out of his power to perform.[21] The order of the court must show upon its face the facts upon which the exercise of the power to punish is based.[22] It is a contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another court.[23]

§ 2419. Disobedience of process.—A chief of police who, having knowledge that a writ of *habeas corpus* has issued for a certain prisoner under his control, endeavors to avoid the service and execution of the writ, and aids in delivering the prisoner into the custody of the messenger of the governor of another state, is guilty of contempt of court.[24] Where the process of a court, as an execution commanding the sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the sheriff under it, and the authority of the court to enforce it, cease; and a wrongdoer afterwards trespassing upon the person thus put in possession cannot be deemed guilty of contempt for disobedience to the process of the court.[25]

§ 2420. Evidence of contempt.—When the contempt is not committed *in facia curiæ*, it must be proved by affidavits from

19 State v. Downing, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

20 Ex parte Cohen, 6 Cal. 318; McCartan v. Van Syckel, 10 Bosw. 694.

21 Adams v. Haskell, 6 Cal. 316, 65 Am. Dec. 517.

22 People v. Turner, 1 Cal. 152; State v. District Court, 34 Mont. 107, 85 Pac. 870; Ex parte Shortridge, 5 Cal. App. 371, 90 Pac. 478; State v. Pendergast, 39 Wash. 132, 81 Pac. 324.

23 Page v. Randall, 6 Cal. 32.

24 State v. District Court, 29 Mont. 230, 74 Pac. 412.

25 Loring v. Illsley, 1 Cal. 24.

persons who witnessed it.[26] A clear case must be shown.[27] A mere preponderance of evidence is not enough.[28] Where the facts which are supposed to establish misconduct in an attorney are susceptible of explanation showing them consistent with professional propriety, the superior court has no power to adjudge the attorney guilty of contempt and to strike him from the rolls without affording him an opportunity for explanation.[29] No intendments of material facts should be indulged in.[30]

§ 2421. Injunction, violation of.—When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond, it was held that subsequent acts of defendant in violation of the original injunction were not in contempt. The remedy of the plaintiff, if there were error in the order modifying the injunction, is by appeal, but he cannot have a *mandamus* to compel the issuance of attachment for contempt.[31] A violation of an injunction, induced by the stratagem of the plaintiff, is not ground for an attachment.[32] Where the court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was refused on the ground that the appeal superseded the injunction, it was held that a *mandamus* may issue to compel the district judge to issue the attachment, the plaintiff's remedy by appeal being inadequate.[33] The superior court alone has jurisdiction to try and punish one in contempt for the violation of an injunction issued out of the said court.[34]

26 7 Dane Abr. 307. As to necessity of affidavit, see State v. Kaiser, 20 Or. 50, 23 Pac. 964, 8 L. R. A. 584. As to insufficient affidavit, see State v. Allen, 14 Wash. 684, 45 Pac. 644.

27 In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7563.

28 Matter of Buckley, 69 Cal. 1, 10 Pac. 69; State v. Small, 49 Or. 595, 90 Pac. 1110. As to court not hearing collateral evidence, see United States v. Dodge, 2 Gall. 313, Fed. Cas. No. 14795; Thornton v. Davis, 4 Cranch C. C. 500, Fed. Cas. No. 13998.

29 Fletcher v. Daingerfield, 20 Cal. 427.

30 Matter of Metcalf v. Messenger, 46 Barb. 325.

31 Fremont v. Merced Min. Co., 9 Cal. 18; Smith v. Speed, 11 Okla. 95, 66 Pac. 511, 55 L. R. A. 402.

32 Sparkman v. Higgins, 2 Blatchf. 29, Fed. Cas. No. 13209.

33 Merced Min. Co. v. Fremont, 7 Cal. 130.

34 People v. County Judge of Placer County, 27 Cal. 151. See cases where defendant was held liable for contempt in cases of violation of injunction: Ewing v. Johnson, 34 How. Pr. 202; Battermann v. Finn, 32 How. Pr. 501. See, also, Neale v. Osborne, 15 How. Pr. 81; People v.

§ 2422. Jurisdiction.—Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency, and silence in its presence; and in such case may apprehend and punish an offender without further examination or proof; but where the offense is committed out of court, the party is entitled to a notice and a hearing in his defense.[35] So of authority to punish a counsel for interrupting the proceedings at the trial.[36] The supreme court has inherent power to punish criminal constructive contempt as to pending cases.[37] The superior courts have jurisdiction to punish for contempts of their process and to issue such writs as are necessary to the exercise of that jurisdiction.[38] This power was designed not only to protect the court from contempt of its authority, but to give a party injured an additional remedy in the action for the restoration of what he was entitled to by the judgment.[39] The jurisdiction to commit for contempt is derived from the original order in which the proceedings are founded, not from the order to show cause why the party should not be punished.[40] Copies of the affidavits upon which the application is founded should be served with the attachment on the order.[41] A judge out of court cannot punish as for contempt a disobedience of an order made by him in a statutory proceeding, unless authority so to punish is expressly conferred by law.[42] A party cannot be punished for contempt in violating an order which the court had no jurisdiction to make.[43]

Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Wheeler v. Gilsey, 35 How. Pr. 139; Eureka Lake etc. Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490; Hobbs v. Amador & S. C. Co., 66 Cal. 161, 4 Pac. 1147; Johnson v. Superior Court, 65 Cal. 567, 4 Pac. 575; Havemeyer v. Superior Court, 87 Cal. 267, 25 Pac. 433, 10 L. R. A. 650; Golden Gate etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628. Each act violative of an injunction is a separate contempt. Id.

35 Ex parte Field, 1 Cal. 187.

36 Heerdt v. Westmore, 2 Robt. 697.

37 People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912.

38 In re Cohen & Jones, 5 Cal. 494; Pitt v. Davison, 37 N. Y. 235; Hughes v. Territory, 10 Ariz. 119, 85 Pac. 1058.

39 People v. Dwinelle, 29 Cal. 632. As to power to punish for contempts, see Ex parte Latimer, 47 Cal. 131; Ex parte Smith, 53 Cal. 204; Ex parte Bergman, 3 Wyo. 396, 26 Pac. 914; People v. Carrington, 5 Utah, 531, 17 Pac. 735.

40 Myers v. James, 3 Abb. Pr. 301.

41 Matter of Smethurst, 2 Sandf. 724.

42 People v. Brennan, 45 Barb. 344.

43 People v. O'Neil, 47 Cal. 109; State v. Winder, 14 Wash. 114, 44 Pac. 125.

§ 2423. Non-compliance with mandamus.—An attachment will not be issued against a district judge for non-compliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attachment is founded that any application has been made to the court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the judge in vacation is concerned, he has in substance complied with the command of the writ of *mandamus;* and in such case it will not be deemed a disobedience of the writ that the court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ.[44] So, also, for not having obeyed a peremptory writ of *mandamus*, where this has been adjudged superseded by a writ of error.[45] An adjudication as to priority of water-rights is *in rem*, and to any persons so as to put them in contempt of court.[46]

In order to render a person guilty of contempt of court for failure to obey the mandate of a court, it must appear that the refusal was willful.[46a]

§ 2424. Order, how reviewed.—In California, a commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a superior court.[47] Where an order was made by the district court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours and fined five hundred dollars for contempt of court, without setting forth any of the facts whereon the order was based, it was held that a *certiorari* should issue to remove the proceedings for review into the supreme court; and further, that a *mandamus* was not a proper remedy in such case.[48] The supreme court may review on *certiorari*, and set aside a judgment for contempt, on the ground that the court exceeded its jurisdiction.[49] It is the right and duty of the supreme court, on *habeas corpus*, to review the decisions of inferior courts, in cases of contempt, as well as in

[44] Ex parte Field, 1 Cal. 188.

[45] United States v. Kendall, 5 Cranch C. C. 385, Fed. Cas. No. 15518. See Spencer v. Lawler, 79 Cal. 215, 21 Pac. 742.

[46] Roberson v. People, 40 Colo. 119, 90 Pac. 79.

[46a] State v. Denham, 30 Wash. 643, 71 Pac. 196.

[47] Ex parte Rowe, 7 Cal. 181.

[48] People v. Turner, 1 Cal. 152. See Ex parte Field, 1 Cal. 188.

[49] Batchelder v. Moore, 42 Cal. 413; People v. O'Neil, 47 Cal. 110.

others.[50] But an order of court adjudging a party guilty of contempt is not appealable.[51]

§ 2425. Order conclusive.—The judgment and orders of the court or judge made in cases of contempt are final and conclusive.[52] Judgment of contempt is reviewable only on the question of jurisdiction.[53] The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate court will compel the court below to issue an attachment to punish a contempt.[54] Every court empowered to punish for contempt is not the sole and final judge in all cases of alleged contempt.[55] An order of court adjudging a party guilty of contempt should always show upon its face the facts upon which the exercise of the power is based and the adjudication is made.[56] Whenever an order of the district court fining and imprisoning for contempt does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*.[57]

§ 2426. Proceedings.—Contempt of court is a specific criminal offense, and strict construction is made in favor of defendant.[58] The procedure as to criminal constructive contempt is governed by the common law in Colorado.[59] The mode of proceeding to punish the editor of a newspaper for contempt in publishing an

50 Ex parte Rowe, 7 Cal. 181; In re Spencer, 82 Cal. 110, 23 Pac. 37; Ex parte Hollis, 59 Cal. 405. Compare Matter of Shortridge, 99 Cal. 526, 37 Am. St. Rep. 78, 34 Pac. 227, 21 L. R. A. 755; Ex parte Vance, 88 Cal. 281, 26 Pac. 118; Ex parte Cohn, 55 Cal. 193; Ex parte Gordon, 92 Cal. 478, 27 Am. St. Rep. 154, 28 Pac. 489.

51 Aram v. Shallenberger, 42 Cal. 275; Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460; Teller v. People, 7 Colo. 451, 4 Pac. 48; Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414. That it is otherwise under § 791 of Washington Code of Procedure, see State v. Allen, 14 Wash. 684, 45 Pac. 644.

52 Cal. Code Civ. Proc., § 1222; Ex parte McCarthy, 29 Cal. 399; Dewey v. Superior Court, 81 Cal. 64, 22 Pac. 333; Ex parte Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380; Ex parte Acock, 84 Cal. 50, 23 Pac. 1029. See Ex parte Clark, 110 Cal. 405, 42 Pac. 905.

53 Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853.

54 Merced Min. Co. v. Fremont, 7 Cal. 130.

55 Ex parte Rowe, 7 Cal. 175.

56 People v. Turner, 1 Cal. 152.

57 Ex parte Field, 1 Cal. 187. As to review of contempt proceedings on certiorari, see State v. District Court, 13 Mont. 347, 34 Pac. 39; In re MacKnight, 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.

58 Reymert v. Smith, 5 Cal. App. 380, 90 Pac. 470.

59 People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912; Mills' Annot. Code, p. 597, ch. 30.

article reflecting upon a court of justice, is as follows: The prosecutor first proves by affidavit that the paper was published at the office of defendant, and that he is editor. Defendant is then called upon by rule to show cause why an attachment should not issue. On this rule he may controvert the fact, or defend on legal grounds. But if it appears that a contempt has been committed, an attachment will be directed, and when the defendant is brought in by it, he may demand that the prosecutor may file interrogatories, and, if by his answers on oath he purges himself from criminality, he must be discharged. But interrogatories cannot be forced upon him. If he will not ask them, and the contempt is proved by affidavit or other testimony of the prosecutor, the court will give judgment against him.[60] Under the Oregon statute, the court may choose to issue a warrant or an order to show cause.[61] Where the plaintiff proceeded, under section 239 of the California Practice Act, to examine his judgment debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding.[62] A proceeding to punish for contempt is in its nature a criminal one, and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused.[63] Although a court has ample power to protect itself in the administration of justice after a contempt has been committed, it is not proper practice to command a person not to commit a contempt.[64] A contempt is presented, as a matter of practice, in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own.[65]

Proceedings to punish for contempt in violating an injunction are civil, and not criminal, and so not within the meaning of a

60 Hollingsworth v. Duane, Wall. C. C. 77, Fed. Cas. No. 6616. See United States v. Duane, Wall C. C. 102, Fed. Cas. No. 14997.

61 State v. Sieber, 49 Or. 1, 88 Pac. 313.

62 Adams v. Hackett, 7 Cal. 187. As to the proceedings in cases of contempt, consult Cal. Code Civ. Proc., §§ 1209-1222; Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699; Spencer v. Lawler, 79 Cal. 215, 21 Pac. 742; Ex parte Cottrell, 59 Cal. 420.

63 Schwarz v. Superior Court, 111 Cal. 106, 43 Pac. 580. See In re Fil Ki, 80 Cal. 201, 22 Pac. 146; Ex parte Hollis, 59 Cal. 405; Ex parte Gould, 99 Cal. 360, 37 Am. St. Rep. 57, 33 Pac. 1112, 21 L. R. A. 751.

64 Dailey v. Superior Court, 112 Cal. 94, 53 Am. St. Rep. 160, 44 Pac. 458, 32 L. R. A. 273.

65 Ex parte Ah Men, 77 Cal. 198, 11 Am. St. Rep. 263, 19 Pac. 380.

statute providing that in criminal proceedings the defendant must be confronted with the witnesses against him.[66]

§ 2427. **Hearing.**—Contempt proceedings are summary, and, though defendant has the right to be heard, the extent of hearing as to questions of law may be limited by the court.[67] The record must show the court's jurisdiction, or the commitment is void.[68] Under a statute permitting the striking out of a party's pleading upon his refusal to testify,[69] plaintiff who refuses to testify before a notary, according to an order for such deposition, may have his complaint stricken from the files of the case, but not until he has been adjudged guilty of a contempt.[70]

§ 2428. **Re-entry on lands.**—The superior courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land after having been dispossessed therefrom by a judgment and process of a court of competent jurisdiction.[71] It is essential that the person accused be one who has been dispossessed or ejected.[72] A person against whom a judgment is recovered in ejectment, and who is removed from the land by a writ of restitution, is not guilty of a contempt for re-entering on the land, if an event has occurred after the judgment and before the re-entry which confers upon him the right of possession.[73]

§ 2429. **Refusal to pay money.**—Where, in the regular course of judical proceedings before a court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he cannot, on application to the supreme court for a writ of *habeas corpus*, question the regularity of the acts; the power of the court below to make the order is the only question.[74] In a suit for divorce, the court has power to order the husband to pay money

66 Davidson v. Munsey, 29 Utah, 181, 80 Pac. 743.

67 State v. Nicoll, 40 Wash. 517, 82 Pac. 895.

68 Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853; Ex parte Shortridge, 5 Cal. App. 371, 90 Pac. 478.

69 Cal. Code Civ. Proc., § 1991.

70 O'Neill v. Thomas Day Co., 152 Cal. 357, 92 Pac. 856.

71 Cal. Code Civ. Proc., § 1210; People v. Dwinelle, 29 Cal. 632; Temple v. Superior Court, 70 Cal. 211, 11 Pac. 699. Compare Larrabee v. Selby, 52 Cal. 506.

72 Batchelder v. Moore, 42 Cal. 412.

73 People v. Dwinelle, 29 Cal. 632; Mahoney v. Van Winkle, 33 Cal. 448.

74 Ex parte Perkins, 18 Cal. 60.

to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt, in case of refusal to pay.[75] Where a party to a divorce suit fails to pay money into the hands of the clerk, upon an order of court directing the payment, it seems that an attachment may issue without summoning the party to show cause why it should not issue;[76] so for the payment of alimony.[77] A party cannot be imprisoned for neglecting or refusing to do what clearly appears not to be in his power to perform; such as an order to pay into court certain moneys, when it is shown he did not have the moneys in question when the order was made.[78] A decree for the payment of money in probate proceedings cannot be enforced as for a contempt, an execution being the proper process.[79]

§ 2430. **Service of order.**—In proceedings to punish the defendant for a contempt for refusing to comply with the judgment, personal service of the order to show cause why the defendant should not be punished is not indispensable;[80] and interrogations are not necessary.[81] But there must be service of the order, or notice, or attachment to answer.[82] But the lack of an allegation of the service of such order is cured by the filing of an answer admitting the issuance of such order.[83] Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him.[84] The superior court loses jurisdiction to punish for a contempt committed in its presence when it delays to take any proceedings in the matter for a period of fifty days after the alleged commission of the contempt, and then attempts to proceed without notice to the respondent.[85]

75 Ex parte Perkins, 18 Cal. 60.

76 Kernodle v. Cason, 25 Ind. 362.

77 Ward v. Ward, 6 Abb. Pr. (N. S.) 79.

78 Adams v. Haskell, 6 Cal. 316, 65 Am. Dec. 517; Gallaud v. Gallaud, 44 Cal. 475, 13 Am. Rep. 167; Matter of Wilson, 75 Cal. 580, 17 Pac. 698. As to contempt in refusing to turn over assets to receiver, see Ex parte Hollis, 59 Cal. 405; State v. Winder, 14 Wash. 114, 44 Pac. 125. As to failure to pay over money held in trust, see Williams v. Dwinelle, 51 Cal. 442.

79 Rostel v. Morat, 19 Or. 181, 23 Pac. 900.

80 Pitt v. Davison, 37 N. Y. 235.

81 Id. For proceedings in such cases, see same case.

82 Cal. Code Civ. Proc., § 1212. See Ex parte Cottrell, 59 Cal. 420.

83 State v. Downing, 40 Or. 309, 58 Pac. 863, 66 Pac. 917.

84 Johnson v. Superior Court, 63 Cal. 578; Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649; Ex parte Rush, 60 Cal. 5.

85 In re Foote, 76 Cal. 543, 18 Pac. 678. As to service of order on

§ 2431. Supplementary proceedings.—Interposing delays in supplementary proceedings, with the effect of defeating the creditor's attempt to reach the property, is a contempt of the order.[86] The refusal to apply property, though the defendant deny under oath that he had any, is a contempt.[87] The power to punish for contempt in supplementary proceedings is not affected by the fact that the judgment was merely for costs.[88]

§ 2432. Undertaking for appearance.—Where a party has been arrested for a contempt, and has given bond, with sureties for his appearance at court, to abide the order of the court, and has been adjudged to be guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party.[89]

§ 2433. Disobedience of witness.—Disobedience to a subpœna, or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court issuing the subpœna.[90] By the amendment of the California Code of Civil Procedure of 1907, the power of punishment by officers or commissioners out of court is removed to the court itself, such officer having authority only to report the act constituting a contempt to the court.[91]

The refusal of one party to give to the other party, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the action or defense, may be punished as a contempt;[92] so of witness not producing books;[93] so of refusal to submit to examination.[93a] An

attorney for corporation, see Golden Gate etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Eureka etc. Canal Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490.

86 Ross v. Clussman, 3 Sandf. 676.

87 Matter v. Pester, 2 Code Rep. 98.

88 Brush v. Lee, 6 Abb. Pr. (N. S.) 50. See, also, as to supplementary proceedings, Gerregani v. Wheelwright, 3 Abb. Pr. (N. S.) 264; State v. Trounce, 5 Wash. 804, 32 Pac. 750.

89 Barton v. Butts, 32 How. Pr. 456.

90 Cal. Code Civ. Proc., § 1991, § 1209 (subd. 10); Clark v. Reese, 35 Cal. 89. See, also, Keisker v. Ayres, 46 Cal. 82. Compare Lezinsky v. Superior Court, 72 Cal. 510, 14 Pac. 104; Clifford v. Allman, 84 Cal. 528, 24 Pac. 292.

91 Code Civ. Proc., § 1991; Stats. 1907, p. 731.

92 Cal. Code Civ. Proc., § 1000.

93 Heerdt v. Wetmore, 2 Robt. 697.

93a Woods v. De Figanire, 1 Robt. 607.

employee of a telegraph company having charge of messages transmitted by it is not guilty of contempt for refusing to obey a *subpœna duces tecum* commanding him to search for and produce all messages from and to a large number of persons therein named between specified dates. The subpœna must identify the particular messages required.[94] Persons who are subpœnaed to appear before the grand jury as witnesses, and fail to do so, may be punished as for a contempt of court.[95] A witness may be fined, and required to give security, for refusing to answer questions before a grand jury, and for insolence to them.[96]

§ 2434. Refusing to testify.—A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the grand jury is not a compliance with the section. The question asked should be set out.[97] In such a case, the commitment should state that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner was required by the court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review, on *habeas corpus*, the proceedings of an inferior court in cases of contempt.[98] A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject-matter before the court, there is no longer a case in which the questions can be asked.[99] It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon.[100] When witnesses are brought before either branch of the legislature, they may be compelled to testify by process of contempt, when without legal cause they refuse to do so.[101] The refusal of a witness to be sworn is a contempt, which is not excused by the assertion of the witness as a reason

94 Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117.

95 Baldwin v. State, 126 Ind. 24, 25 N. E. 820.

96 United States v. Caton, 1 Cranch C. C. 150, Fed. Cas. No. 14758.

97 Ex parte Rowe, 7 Cal. 181.

98 Id.

99 Ex parte Rowe, 7 Cal. 175.

100 Id.

101 Ex parte McCarthy, 29 Cal. 395.

for his refusal that his testimony would have a tendency to subject him to punishment for a felony. This privilege cannot be urged until a question is put to him, after being sworn, the answer to which would have that tendency. Each refusal to be sworn is a separate contempt, for which the court may impose separate punishments.[102] But the refusal of a witness to answer a question not pertinent to the issues on trial is not a contempt, and an order adjudging him guilty of a contempt which fails to show the pertinency of the question is invalid.[103]

§ 2435. **Misconduct of attorney.**—An affidavit for change of judges, in which charges of willful and corrupt erroneous rulings are made, constitutes contempt of court upon part of the attorney.[104] Persistently addressing the court after being refused permission is contempt.[105] Any pleading which imputes dishonesty in the judges of the supreme bench is a contempt of such court, which cannot be purged by disavowing any intent to commit a contempt.[106]

§ 2436. **Ministerial versus judicial duties of court.**—A publication reflecting upon the manner in which a county judge performs certain ministerial duties, such as accounting for his fees, does not furnish basis for contempt.[107] Criticisms may be made upon a court's opinion, so long as it is made in good faith, in ordinary, respectful language.[108]

§ 2437. **Contempts—Miscellaneous.**—Persons summoned as jurors commit a contempt of court by talking with litigants and forming an opinion upon the merits of their cases.[109] And any offer of bribe to members of the panel summoned for service as jurors is a contempt.[110] Disobedience of a decree of distribution by an executor or administrator is a contempt of court.[111] So

102 Ex parte Stice, 70 Cal. 51, 11 Pac. 459.

103 Ex parte Zeehandelaar, 71 Cal. 238, 12 Pac. 259; In re MacKnight, 11 Mont. 126, 28 Am. St. Rep. 451, 27 Pac. 336.

104 Lamberson v. Superior Court, 151 Cal. 458, 91 Pac. 100, 11 L. R. A. (N. S.) 619.

105 Ex parte Shortridge, 5 Cal. App. 371, 90 Pac. 478.

106 In re Chartz, 29 Nev. 110, 124 Am. St. Rep. 915, 85 Pac. 352.

107 Hamma v. People, 42 Colo. 401, 94 Pac. 326, 15 L. R. A. (N. S.) 621.

108 In re Breen (Nev.), 93 Pac. 997.

109 Ruff v. Rader, 2 Mont. 211.

110 State v. District Court, 37 Mont. 191, 95 Pac. 593.

111 Ex parte Cohn, 55 Cal. 193; Ex parte Smith, 53 Cal. 204.

of the willful refusal of a party to comply with the decree of a court of competent jurisdiction, directing him to execute a conveyance,[112] or to desist from acting in capacity of a certain public officer.[113] One who continues to exercise the functions of a public office after being adjudged a usurper, is guilty of a contempt.[114] So one who obstructs and takes from a police officer, by means of legal process, certain personal property taken by such officer under a search-warrant issued by a judge of the superior court, is guilty of a contempt.[115] A party cannot be held guilty of constructive contempt for refusing to comply with a mere verbal announcement of a direction or order having no existence of record.[116] And the court cannot acquire jurisdiction to punish a defendant for contempt by entering a *nunc pro tunc* order modifying the decree at the hearing of an order to show cause why the defendant should not be punished, so as to make the record conform to a prior verbal order not previously entered of record.[117] Where power is conferred by statute upon a police court to punish for contempt, the exercise of the power is restricted to the specific acts defined by law to constitute the offense.[118]

§ 2438. **Contempt—Discharge.**—After an order of a court on *habeas corpus* discharging a person under sentence of imprisonment for contempt of another court, he cannot be again imprisoned for the same contempt.[119]

§ 2439. **Contempt, prior punishment for.**—The court is not deprived of authority to punish for contempt by reason of a prior imprisonment for contempt in a matter distinct from that for which the subsequent order was made, where it appears that the contempt first punished was committed prior to the first imprisonment, and that the offense subsequently punished is the violation of a subsequent order which could not have been made

112 Seventy-Six Land etc. Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813.

113 People v. Horan, 34 Colo. 336, 114 Am. St. Rep. 163, 86 Pac. 263.

114 Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110.

115 Matter of Lowenthal, 74 Cal. 109, 5 Am. St. Rep. 424, 15 Pac. 359.

116 Cosby v. Superior Court, 110 Cal. 45, 42 Pac. 460.

117 Id.

118 In re Shannon, 11 Mont. 67, 27 Pac. 352.

119 Grady v. Superior Court, 64 Cal. 155, 30 Pac. 613.

the basis of the prior contempt.[120] Where an attorney has been disbarred for misconduct in criticising the court, an attempt to punish him for contempt therefor will be dismissed as a double punishment.[121]

§ 2440. **Defenses.**—The truth or falsity of contemptuous matter published concerning a pending cause, is immaterial.[122] That the court is not affected by the contempt is no defense.[123]

FORMS IN CONTEMPT OF COURT.

§ 2441. Commitment for contempt for disrespectful language.

Form No. 663.

[TITLE.]

The People of the State of California, to the Sheriff of . . . County, greeting:

Whereas, an action was duly commenced in the said court on the . . . day of . . . , 19.., between A. B. as plaintiff and C. D. as defendant, for the purpose of [state purpose of the action], and was regularly pending in said court on the . . . day of . . . , 19..;

And whereas, on that day, during the hearing of said action, and in the presence and hearing of said court, while said court was in session, R. N., a witness summoned in said action [or, the plaintiff; or, defendant; or, counsel; or, a bystander; or, otherwise, as the case may be], did publish, utter, and say aloud, and in the hearing of the court and others, that [here insert disrespectful or contemptuous language], of and concerning said court, with the view, on the part of the said R. N., to bring this court and its proceedings in said action into contempt, and that such misconduct did, in fact, impair, hinder, and prejudice the rights and remedies of A. B., the plaintiff [or, of C. D., the defendant] in said action, and did, in fact, interrupt, impede, and hinder the course of justice in the hearing and deliberation of the court in said action, and that the said R. N. thereby had

120 Ex parte Clark, 110 Cal. 405, 42 Pac. 905.

121 In re Breen (Nev.), 93 Pac. 1004.

122 Hughes v. Territory, 10 Ariz. 119, 85 Pac. 1058; People v. News-Times Co., 95 Colo. 253, 84 Pac. 912.

123 People v. News-Times Pub. Co., 35 Colo. 253, 84 Pac. 912.

become liable to punishment for said disrespectful and contemptuous language, pursuant to the statute in such case made and provided;

And whereas, the said court did, at the same time by its order, then duly entered, adjudge and declare that the said R. N. had been guilty of a contempt of said court by the use of said disrespectful and contemptuous language, and did order that the said R. N. be punished for his said contempt by imprisonment in the common jail of . . . county for the term of . . . days:

Now, therefore, you are required and commanded, and we do warrant and enjoin you, that you forthwith attach the said R. N. and commit him to the common jail of . . . county, and detain him there for the term of . . . days, as a punishment for his said contempt of the . . . court, and for such arrest, imprisonment, and detention, this shall be your sufficient warrant.

Witness, the Hon. J. C., judge of the . . . court, at the city hall, in the city and county of . . . , this . . . day of . . . , 19..

[SIGNATURE.]

By the special order of the court.

[SIGNATURE OF CLERK.]

§ 2442. Commitment for refusal to testify.

Form No. 664.

[VENUE.]

The People of the State of California, to A. P., Sheriff of the said County, greeting:

E. F., having this day been brought before me, on a warrant by me issued to compel his attendance to testify [where the witness appears in pursuance of the subpœna, say: having this day appeared before me, in pursuance of a subpœna by me issued, requiring him to appear and testify], touching the execution of a conveyance of real estate from K. B. to C. T., to which the said E. F. is a subscribing witness, as is said; and the said E. F., although required by me, having refused to answer upon oath [if the commitment is made on account of the refusal of the witness to answer a particular question deemed pertinent by the officer, insert here: the following question, etc., specifying it particularly] touching the execution of said conveyance:

You are, therefore, commanded forthwith to convey the said E. F. to the jail of the said county, and there commit him to

close custody in such jail, without bail, until he shall submit to answer on oath as aforesaid [or, the question aforesaid], or be discharged according to law.

[DATE.] O. P., Judge of . . . County.

§ 2443. Affidavit of failure to deliver money or property, as a foundation for contempt proceedings.

Form No. 665.

[TITLE.]

[VENUE.]

E. F., being duly sworn, says: That he is the attorney for the plaintiff in the above-entitled action; that in the course of certain supplementary proceedings in this action an order was duly made by [name officer] requiring the said C. D. [state requirements of order], which order was duly served upon said C. D., on the . . . day of . . . , 19.., as appears by the affidavit of service indorsed thereon and herewith submitted, which order is annexed to this affidavit and made part hereof; that C. D. has wholly refused, and still refuses, to obey said order, and refuses to deliver over said property [or otherwise specifically state the default], although due demand has been made on him so to do, and declares that he will not comply with said order.

[JURAT.] E. F.

§ 2444. Affidavit in civil contempt proceedings, showing failure to comply with court's order for payment of money.

Form No. 666.

[TITLE.]

[VENUE.]

A. B., being first duly sworn, says: That he is the plaintiff in the above-entitled action; that on the . . . day of . . . , 19.., at . . . , in said county, he served the order hereto annexed [or, a copy of which is hereto annexed] on C. D., the defendant in this action, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the original order and the signature of J. K., the judge who signed the said order thereon; and then and there made personal demand of the said C. D. that he pay the sum required to be paid by said order; and that the said C. D. then and there refused to pay the same, and stated to

affiant that he would not pay said sum at any time; and affiant further says that said sum is still unpaid.

[JURAT.] A. B.

§ 2445. Affidavit for order to show cause why party should not be punished criminally for contempt not committed in presence of the court.

Form No. 667.

[TITLE.]

[VENUE.]

Y. Z., being first duly sworn, says:

That on the . . . day of . . . , 19.., in an action pending in said court, wherein L. M. was plaintiff and O. P. was defendant, an order was duly made by this court, of which a copy is hereto annexed, marked exhibit A, requiring the above-named defendant to [here specify act required];

That on the . . . day of . . . , 19.., the said order was duly served on said defendant, in said county, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the said original order aforesaid, with the signature of the judge of said court appended thereto, as more fully appears by the affidavit of service indorsed on said order and on file in this court [or, attached hereto and marked exhibit B];

That said A. B. has willfully and contumaciously refused, and still refuses, to obey said order in this, to-wit, [state the act or failure to obey];

That this application is made for the purpose of obtaining an order to show cause why said A. B. should not be punished as for criminal contempt.

[JURAT.] Y. Z.

§ 2446. Order to show cause in criminal contempt.

Form No. 668.

[TITLE.]

On reading and filing the affidavit of Y. Z.,

Ordered, that the above-named defendant, A. B., show cause before this court at the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon of said day, or as soon thereafter as counsel can be heard, why he should not be punished as for contempt for his

misconduct in failing to obey the order of said court as set forth in the said affidavit [or, otherwise, state the act of contempt according to the fact].

Let this order and a true copy of said affidavit be served on said A. B., at least . . . days before the time herein fixed for hearing.

By the Court: J. K., Judge.

§ 2447. Attachment for witness disobeying a subpœna.

Form No. 669.

[TITLE.]

The People of the State of . . . to the Sheriff of . . . County, greeting:

Whereas, it has been made to appear to the . . . court for . . . county, by due proof, that on the . . . day of . . . , 19.., in said county, a subpœna issued out of said court, directed to said L. M., requiring him to appear before our said court, on the . . . day of . . . , 19.., at . . . o'clock in the forenoon of said day, to give evidence in a certain cause then and there to be tried between A. B., plaintiff, and C. D., defendant, on the part of the plaintiff, was duly and personally served upon said L. M. at . . . , on the . . . day of . . . , 19.., and that the fees of said witness for such attendance, and for traveling to and returning from the place where he is required by said subpœna to attend, were then and there duly paid [or, not demanded by] said L. M., and that he has failed and neglected to attend, as required by such subpœna, and is not in attendance:

Now, therefore, we command you, that you attach the said L. M. and forthwith bring him before our said court, at the courthouse, in the city of . . . , in said county, to answer for his contempt in not obeying said subpœna, and to testify in said cause in which he is summoned as aforesaid.

Witness, etc.

CHAPTER LXXXV.

ARREST AND BAIL.

§ 2443. In general.—Arrest, in civil practice, is the apprehension of a person by virtue of a lawful authority to answer the demand against him in a civil action. It is one of the means which the law gives the creditor to secure the person of his debtor while the suit is pending, or to compel him to give security for his appearance after judgment.[1] The law of the place where the action is brought governs the procedure.[2]

At a time as late as the founding of the American colonies, arrest for debt was quite common, and everybody, with a few exceptions, was liable. It may be noted that a married woman came in the favored class;[3] but that her privilege might be forfeited by her conduct.[4] But now mere poverty excites sympathy, and charity has supplanted the jail. Now there must be some fraud connected with the contraction of the debt or with the failure to satisfy the same when due.[5] Public opinion has changed the fundamental laws so that it is the exceptional case that permits the arresting of a defendant in a civil suit. Since there must be a charge of fraud against the defendant, either in the making of a contract or in the failure to perform it, the action savors of a criminal charge, and the defendant will receive the benefit of the doubt. The statute will be strictly construed, and in no case should a defendant be arrested in a civil action unless it is clear that the facts charged will bring him within the letter as well as the spirit of the statute.

The purpose of the statutes permitting arrest is double,—to secure the plaintiff in his rights, and to punish the defendant for his fraud. It is the rule that in the affidavit prescribed by section 481 of the California Code of Civil Procedure, the mere statement in the language of the statute showing the defendant's guilt is not enough; the facts must be clearly and openly stated, and not the result of facts which are assumed to exist. The history of the

1 Bouv. Law Dict.; La. Civ. Code, art. 211.

2 Ex parte Howtiz, 2 Cal. App. 752, 84 Pac. 229.

3 1 T. R. 486; 6 T. R. 451.

4 5 Bos. & P. 380.

5 Cal. Const., art. 1, § 15; Wash. Const., art. 1, § 17.

fundamental acts must be given in particularity, and no form of affidavit can be given which will fit all cases, or even more than one, except as to the most formal parts.

§ 2449. Who are privileged from arrest.—Taking California for an example, the constitution of the state abolishes imprisonment for debt except in case of fraud, and in civil actions for tort, unless it be in cases of willful injury to person or property.[6] Upon grounds of public policy certain classes are exempt from arrest in the foregoing cases: 1. Members of the legislature shall be privileged from arrest, and shall not be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session, treason, felony, and breach of the peace excepted.[7] 2. Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest on the days of election, during their attendance at such election, going to and returning therefrom.[8] 3. No person under military orders for parade, drill, or other military service is subject to arrest on civil process while going to, returning from, or on such parade.[9] 4. No person can be imprisoned for a militia fine in time of peace.[10] The code further provides that no female can be arrested in any action, at least in the justice of peace court;[11] that witnesses who have been in good faith served with a subpœna to attend before a court, judge, commissioner, referee, or other person, in a case where disobedience may be punished as a contempt, are exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there, and returning therefrom, and they are protected in this right by a penalty imposed for making such a wrongful arrest;[12] and that electors shall be exempt on election day.[13] The last provision is practically the same as the constitutional provision for electors' exemption.

By common law, the exemption extends to jurors, parties, officers, and judges, and protects them, while in attendance upon their public duties, from arrest, summons, or any other civil process;[14] but a defendant, as witness, is not exempt from answering in an

6 Cal. Const., art. 1, § 15.
7 Cal. Const., art. 4, § 11.
8 Cal. Const., art. 2, § 2.
9 Cal. Pol. Code, § 2093.
10 Cal. Const., art. 1, § 15.
11 Cal. Code Civ. Proc., § 861.
12 Cal. Code Civ. Proc., §§ 2067, 2068.
13 Cal. Pol. Code, § 1069.
14 Cassidy v. Steuart, 40 Eng. Com. Law, 464; Hurst's Cases, 4 Dall. 388, 1 L. Ed. 878; Geyer v. Irwin, 4 Dall.

examination by the court, as to whether he is privileged from arrest.[15] In the last case, there were contradictory affidavits as to the residence of defendant, who was held in San Francisco to answer concerning his property there; and refusing to do so, under the impression that the court did not have jurisdiction, defendant having come from his home in Sacramento to attend as a suitor upon the board of United States land commissioners, he was justly held for contempt. His answer did not allege that at the precise time of the summons he was in attendance upon any court as witness, juror, or party.

The privileges of a party to a suit or of a witness extend to exemption from arrest, and no further.[16] It is the same with an applicant for the benefit of the bankruptcy law.[17] The privilege of a witness protects him while at his lodgings as well as in the street, going to or from the court;[18] but it does not extend after he is discharged from the obligation of the subpœna.[19] An elector or other party who is exempt waives his privilege by giving bail or by an appearance.[20] The privilege of a policeman extends only to the time he is on duty.[21]

Though the common-law privileges of officers of the courts of justice cannot be taken away by the general words of the statute, yet they may be by the manifest intent of them.[22]

§ 2450. Abatement of the writ.—The mode of redress for a person privileged from arrest, when arrested, is by motion to the court from which the process was issued to set aside the service and discharge the party.[23] However, it is erroneous to vacate the order of arrest on the ground that the defendant is exempt by virtue of his office; for the plaintiff is entitled to retain his order for the purpose of making the arrest when the exemption expires.[24]

107, 1 L. Ed. 762; Bolton v. Martin, 1 Dall. 296, 1 L. Ed. 144; Ex parte McNeil, 6 Mass. 245; Tracy v. Whipple, 8 Johns. 330; Lyell v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8616; Page v. Randall, 6 Cal. 32.

15 Page v. Randall, 6 Cal. 32.

16 Blight v. Fisher, Pet. C. C. 41, Fed. Cas. No. 1542; McFerran v. Wherry, 5 Cranch C. C. 677, Fed. Cas. No. 8792.

17 Anonymous, 6 Hunt's Merch. Mag. 355.

18 Ex parte Hurst, 1 Wash. C. C. 186, Fed. Cas. No. 6924.

19 Smythe v. Banks, 4 Dall. 329, 1 L. Ed. 854.

20 Petrie v. Fitzgerald, 1 Daly, 401.

21 Hart v. Kennedy, 39 Barb. 186, 24 How. Pr. 425, 15 Abb. Pr. 290; reversing 23 How. Pr. 417.

22 Case of Bliss, 9 Johns. 347.

23 Lyell v. Goodwin, 4 McLean, 29, Fed. Cas. No. 8616.

24 Hart v. Kennedy, 15 Abb. Pr. 290, 24 How. 425.

§ 2451. Grounds for arrest.—The defendant may be arrested under the following five cases: 1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors; 2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment, or for a willful violation of duty; 3. In an action to recover possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of to prevent its being found or taken by the sheriff; 4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought; 5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.[25]

There are some special statutes authorizing an arrest, as follows: In forcible entry or detainer, when the complaint establishes to the satisfaction of the judge or justice, fraud, force, or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.[26] In an action to gain possession of an office usurped by another, the defendant, on affidavit being made to the satisfaction of a justice of the supreme court, or a judge of the superior court, that the defendant usurper has received fees or emoluments belonging to the office by means of his usurpation thereof, may be arrested upon an order and held to bail as in other civil actions where defendant may be arrested.[27] After issuing of an execution against property, and upon affidavit to the satisfaction of the court, that a judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the court may issue an order requiring such debtor to appear at a certain time and place to answer concerning the same; or if the affidavit of the judgment creditor, his agent or attorney, shows that there is danger of the judgment debtor absconding, the order may direct the sheriff to arrest the debtor as in any other civil proceeding where defendant may be arrested.[28]

25 Cal. Code Civ. Proc., § 479.
26 Cal. Code Civ. Proc., § 1163.
27 Cal. Code Civ. Proc., § 804.
28 Cal. Code Civ. Proc., § 715.

Other cases in which one is subject to arrest in civil actions are of the nature of contempt, such as refusing to produce a will.[29] The grounds for arrest are practically the same in the justice's court, with the exception that the justice of the peace is expressly prohibited from ordering the arrest of a female in any action.[30]

§ 2452. Defendant about to depart from the state with fraudulent intent.—Evidence of a fraudulent intent must depend upon the particular circumstances of each case. The declarations of a debtor are often sufficient, at least if coupled with acts of a suspicious character.[31] The mere fact that defendant owes debts to a large amount, and is about to depart, is not enough. It must appear that he has removed or disposed of his property, or is about to do so, secretly, for it is the secrecy which evinces the fraudulent intent.[32] And arrest will not lie if a judgment debtor, pending an appeal, is unable to dispose of property in question, as in case of appeal from decree of divorce.[33] This is not the absolute rule in all cases.[34] Assault and battery is not a case of fraud.[35] Absenting himself from his place of business, or removing part of his goods to places unknown to the plaintiff, is not sufficient evidence of defendant's intent to depart from the state with fraudulent intent.[36]

§ 2453. Conversion of property—Fiduciary character. — The complaint should state the facts that constitute the fiduciary capacity as well as its nature and extent; defendant must have received the money as an agent in the course of his employment and converted it to his own use.[37] A broker who misapplies funds deposited is arrestable, and the taking of collaterals does not change the character of his liability.[38] A consignee who guarantees payment is arrestable.[39] A party receiving the avails of goods

29 Cal. Code Civ. Proc., § 1302.

30 Cal. Code Civ. Proc., § 861.

31 Smith v. Luce, 14 Wend. 237, note; Ex parte Robinson, 21 Wend. 672; Castellanos v. Jones, 5 N. Y. 164; Donnelly v. Corbett, 7 N. Y. 500; Van Alstyne v. Erwine, 11 N. Y. 331; Hathorn v. Hall, 4 Abb. Pr. 227; Courter v. McNamara, 9 How. Pr. 255.

32 Anonymous, 2 Code Rep. 40.

33 Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091.

34 Courter v. McNamara, 9 How. Pr. 255; McButt v. Hirsch, 4 Abb. Pr. 441; Spies v. Joel, 1 Duer, 669.

35 Ex parte Prader, 6 Cal. 239.

36 Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726.

37 Porter v. Hermann, 8 Cal. 623.

38 Dubois v. Thompson, 1 Daly, 309, 25 How. Pr. 417.

39 Ostell v. Brough, 24 How. Pr. 274.

as indemnity against his guaranty of payment is arrestable,[40] as is also a guardian who uses the funds of a ward without order of court.[41] The claim of a third person to the money in question is no bar to arrest of the fiduciary receiving and misapplying it.[42] The part payment for goods held by the bailee, who is to return them on settlement for them, is no bar to arrest in a subsequent action for their conversion.[43]

§ 2454. Conversion of property—Agents and partners.—An agent who is intrusted with negotiable paper to be discounted, and who transfers it to a *bona fide* purchaser for value, and applies the proceeds to his own use, is liable for the money in a fiduciary capacity.[44] In a suit to recover money received by an agent, he cannot be arrested without showing some fraudulent conduct on his part or a demand upon him by the principal and a refusal by him to pay.[45]

While partners are considered agents of one another, the words "fiduciary capacity" do not characterize the relation which one partner bears to another. Where a partnership has goods which are sold by one of the partners, the partner selling them is not subject to arrest at the instance of his partner in an action to recover a part of the proceeds.[46] Section 74 of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another.[47]

§ 2455. Conversion of property—To prevent its being found by sheriff.—The defendant may be arrested in an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff.[48] Where the right to an arrest flows directly from the matter of the cause of action itself, the court will not try the merits upon affidavits, and will not discharge the order unless the defendant

40 Chaine v. Coffin, 17 Abb. Pr. 441.

41 Wheelock v. Stewart, 28 How. Pr. 89.

42 Duguid v. Edwards, 32 How. Pr. 254.

43 Person v. Civer, 29 How. Pr. 432.

44 Wolfe v. Brouwer, 5 Robt. 601.

45 Cal. Const., art. 1, § 15; Matter of Holdforth, 1 Cal. 438.

46 Soule v. Hayward, 1 Cal. 345.

47 Cal. Code Civ. Proc., § 479; Soule v. Hayward, 1 Cal. 345.

48 Cal. Code Civ. Proc., § 479, subd. 3.

makes out a clear case of innocence.[49] Arrest may be had for converting shares of stock.[50] There must be a fraudulent concealment in order to maintain arrest under subdivision 3 of the New York statute.[51]

§ 2456. **Fraud in contracting a debt.**—A defendant cannot be arrested for fraudulent representations in obtaining money, when the representations were made some time after the money was obtained.[52] Under subdivision 4 of section 179 of the New York Code of Civil Procedure,[53] the defendant in an action to recover damages for false and fraudulent representations respecting the pecuniary ability of a third person is liable to arrest.[54] In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations alleged to have been fraudulent and deceitful were not true.[55]

When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought, he may be arrested.[56] An honest though abortive intent to continue business and pay for the goods is consistent with the vendee's knowledge of his own insolvency; and the purchase is not fraudulent when made with such intent, though founded on delusive and unreasonable expectations.[57]

An arrest for fraudulent representations, inducing purchase of property in a foreign country, will be sustained when the property is brought into the state, though in such foreign country defendant would not have been arrestable.[58] The *lex fori* governs. The right to arrest a defendant in a civil action is a part of the remedy accorded plaintiff by the law of the place where the suit is brought, without regard to the domicile of the parties,

49 Royal Ins. Co. v. Noble, 5 Abb. Pr. (N. S.) 54.

50 Kullmann v. Greenebaum, 84 Cal. 98, 24 Pac. 49.

51 Jananique v. De Luc, 1 Abb. Pr. (N. S.) 419; Elston v. Potter, 9 Bosw. 636.

52 Snow v. Halstead, 1 Cal. 361.

53 As amended in 1863, and which corresponds to subd. 4 of section 479 of the California Code of Civil Procedure.

54 Hazlett v. Gill, 19 Abb. Pr. 353.

55 Belden v. Henriques, 8 Cal. 87.

56 Cal. Code Civ. Proc., § 479, subd. 4; Bean v. Renway, 17 How. Pr. 90; Freeman v. Leland, 2 Abb. Pr. 479; Bell v. Mali, 11 How. Pr. 254; Union Bank v. Mott, 6 Abb. Pr. 315.

57 Nichols v. Pinner, 18 N. Y. 295. Compare Mitchell v. Worden, 20 Barb. 253.

58 City Bank v. Lumley, 28 How. Pr. 397.

the origin of the right, or the place of the commission of the act relied on. Defendant presented a forged check to plaintiff at Shanghai, and obtained thereon nine thousand seven hundred and eighty taels, of the value of six thousand two hundred and ninety dollars, and shortly afterwards took passage, under an assumed name, for America. He was arrested in an action for debt on landing in San Francisco.[59]

§ 2457. Fraud in contracting a debt—Obligation and debt.—Debt and obligation have the same meaning in connection with this statute, both importing a contract liability. Debt implies a fixed and absolute liability, a sum actually owing from one party to another. Obligation includes an inchoate and conditional liability, the fixed character of which is to be determined by subsequent events.[60]

§ 2458. Fraud in contracting a debt—Partners.—Over the question of the liability of one partner to arrest for the fraudulent act of another partner there is some difference of opinion, but the proper rule seems to be as follows: One partner cannot be arrested for the fraudulent act of another, unless he has in some way participated in that fraud or ratified it in some way, as by retaining the benefits of the fraud after he learns of it.[61] This knowledge of the fraud may be gained through constructive notice, as where an assignment is made for the benefit of certain creditors, and one of the partners had mere constructive knowledge of a firm trust in favor of another, either or both of the partners may be arrested for the fraudulent assignment.[62]

The partner who is guilty of the fraud may be arrested;[63] and where the partnership is liable as a whole, the plaintiff may pick out one of the partners who is mostly responsible for the fraud and have him arrested.[64] In a North Carolina case,[65] the defend-

59 Ex parte Howtiz, 2 Cal. App. 752, 84 Pac. 229.

60 Ely v. Steigler, 9 Abb. Pr. (N. S.) 35; Smith v. Corbiere, 3 Bosw. 634; Oatley v. Lewin, 47 Barb. 18; Crandall v. Bryan, 15 How. Pr. 48.

61 Hitchcock v. Peterson, 14 Hun, 389; National Bank v. Temple, 2 Sweeny (N. Y.) 344; Scott v. Reed, 8 N. Y. Civ. Proc. Rep. 269; Hanover Co. v. Sheldon, 9 Abb. Pr. 240, note; overruled in Sherman v. Smith, 42 How. Pr. 198.

62 Durham Fertilizer Co. v. Little, 118 N. C. 808, 24 S. E. 664.

63 Boykin v. Maddrey, 114 N. C. 89, 19 S. E. 106; Whitmark v. Herman, 44 N. Y. Super. Ct. 144.

64 National Bank v. Jennings, 38 S. C. 372, 17 S. E. 16.

65 McNeely v. Haynes, 76 N. C. 122.

ant was dismissed because he was not present when the goods were purchased by his partner, who had committed the fraud and escaped, because he had no knowledge of the fraud, and in no wise connived at, or assented to it, and did not receive any of the goods, which were sent to the defrauding partner. It is the same where the fraud is committed and the benefits received by an agent of the principal who has no knowledge of the fraud and receives no benefits therefrom;[66] but where the defendant has in any way ratified the fraudulent act he may be arrested.[67] There are a number of cases holding that one partner is liable for the fraud of another.[68]

§ 2459. **Fraud in contracting the debt—Intent.**—In all cases where fraud is charged, proof of an actual intent ought to be required to justify or sustain an arrest.[69] A purchase with the preconceived design not to pay is fraudulent, though a mere concealment of insolvency does not make it so.[70] An honest but unreasonable intention of the vendee to continue business, even when he is insolvent, keeps his purchase from being fraudulent.[71] But a purchaser who obtains credit by false representations must be held to intend the legitimate consequences of his act.[72] An attempt to postpone payment for a week, and failing within two days thereafter, is conclusive evidence of intent to defraud, if no explanation is made.[73] That the intent to defraud existed at the time of making the contract may be inferred from subsequent circumstances.[74] A party making a representation false in fact is liable for it, though at the time he made it he did not know whether it was true or false.[75] It is not necessary that the misrepresentation should be the entire inducement to allowing credit.[76]

66 Claflin v. Frank, 8 Abb. Pr. 412.

67 Bennett v. Judson, 21 N. Y. 238; Crans v. Hunter, 28 N. Y. 289, 393; Elwell v. Chamberlain, 31 N. Y. 611, 619.

68 Union Bank v. Mott, 6 Abb. Pr. 319, note; Townsend v. Bogart, 11 Abb. Pr. 355; Bull v. Melliss, 9 Abb. Pr. 58; Coman v. Reese, 21 How. Pr. 114; Sherman v. Smith, 42 How. Pr. 198.

69 Birchell v. Straus, 28 Barb. 293; Gaffney v. Burton, 12 How. Pr. 516.

70 Hennequin v. Naylor, 24 N. Y. 139; King v. Phillips, 8 Bosw. 603.

71 Nichols v. Pinner, 18 N. Y. 295. Compare Mitchell v. Worden, 20 Barb. 253.

72 Whitcomb v. Salsman, 16 How. Pr. 533.

73 Smith v. Frank, 2 Robt. 626.

74 Lovell v. Martin, 11 Abb. Pr. 126. See Philips v. Benedict, 33 Barb. 655, 20 How. Pr. 265.

75 Craig v. Ward, 36 Barb. 377; Sharp v. Mayor of New York, 40 Barb. 256, 25 How. Pr. 389.

76 Shaw v. Stine, 8 Bosw. 157.

When one purchased bills of exchange on credit, for the purpose of remitting to Europe, and afterwards sold them in the market, it was held that as he purchased the bills with the intention of making such use of them, and knew his inability to pay them, the purchase was fraudulent, and he was liable to arrest in an action for their value.[77] A defendant cannot be arrested for fraudulent representations in obtaining money when the representations were made some time after the money was obtained.[78]

§ 2460. Fraud in contracting the debt—Evidence.—In order to sustain the allegations of fraud in contracting the debt, it is necessary to prove that the representations were fraudulent and deceitful, and not true.[79] It has been held that to entitle a party to the remedy of arrest it is not necessary that he should know positively of the commission of the fraud, but that it is sufficient if the circumstances detailed would induce a reasonable belief that fraud was intended and was actually accomplished.[80] An assignee of a cause of action is apt to have to rely upon a reasonable belief sustained by circumstances.[81] An original cause of action is merged in a foreign judgment in an action for fraud, and the defendant is not arrestable in an action on such judgment;[82] but a vacated judgment is no bar to arrest for the same cause, though ordered to stand as security.[83] The remedy of arrest for fraud may be waived by negligence or compromise.[84] Fraud in incurring original indebtedness is not merged in taking the debtor's note or check; but he may be arrested after its dishonor.[85]

Finally, it must be shown that the defendant has made representations which are false; that he knew them to be false, or was careless in not knowing whether they were false or not;[86] and that the plaintiff relied upon and was deceived by them,[87] though plaintiff may not have relied wholly upon the representa-

77 Morrison v. Garner, 7 Abb. Pr. 425. See, also, Brown v. Montgomery, 20 N. Y. 287, 75 Am. Dec. 404.

78 Snow v. Halstead, 1 Cal. 361.

79 Belden v. Henriques, 8 Cal. 87.

80 Southworth v. Resing, 3 Cal. 378.

81 Grocer's Nat. Bank v. Clark, 32 How. Pr. 160.

82 Mallory v. Leach, 23 How. Pr. 507, 14 Abb. Pr. 449, note.

83 Mott v. Union Bank, 8 Bosw. 591.

84 Adams v. Sage, 28 N. Y. 103.

85 Shipman v. Shafer, 14 Abb. Pr. 449. See, also, Murphy v. Fernandez, 10 Bosw. 665.

86 Gaffney v. Burton, 12 How. Pr. 516; Young v. Covell, 8 Johns. 23, 5 Am. Dec. 316; Addington v. Allen, 11 Wend. 374.

87 Freeman v. Leland, 2 Abb. Pr. 479; Wanzer v. De Baun, 1 E. D. Smith, 261.

tions made by defendant.[88] It is not necessary that the defendant should be benefited by his false representations or in collusion with another. It is sufficient if the representations induce action by the plaintiff.[89] But to give a cause for action on the misrepresentations, they must be made to the plaintiff, or with a design to influence his action.[90] Evidence of contemporaneous fraud may be admitted.[91]

§ 2461. **Complaint.**—The writ of arrest being an intermediate process to secure the presence of the defendant until final judgment, no arrest can be had on final process unless the fraud is stated in the complaint, and in the judgment after the facts on which it is based are established. The affidavit will not aid the complaint.[92] There must be great care taken to specify the circumstances which establish the fraud relied upon by the petitioner. Upon motion to vacate the order, plaintiff cannot set up any ground for retaining the order that he has not put forth in the complaint.[93] To authorize an arrest of the defendant upon an execution issued upon a judgment recovered in an action on contract, the fraud for which the arrest is sought must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment.[94] When the grounds for arrest arise subsequently to the filing of the complaint, application should be made to the court either to amend the original or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked in the judgment sought.[95]

§ 2462. **Complaint—Conversion of property.**—The complaint should state the facts that constitute the fiduciary character, as well as its nature and extent, and it is necessary not alone to charge that defendant received the money as agent, but that he converted it in the course of his employment as such. Where

88 Craig v. Ward, 36 Barb. 377; Sharp v. Mayor of New York, 40 Barb. 256. See Shaw v. Stine, 8 Bosw. 157.

89 Hubbard v. Briggs, 31 N. Y. 518.

90 Van Kleeck v. Le Roy, 37 Barb. 544; Farrington v. Bullard, 40 Barb. 512, 516; White v. Dodds, 42 Barb. 554, 28 How. Pr. 197, 18 Abb. Pr. 250.

91 Amsden v. Manchester, 40 Barb. 158.

92 Matoon v. Eder, 6 Cal. 57.

93 Cady v. Edmonds, 12 How. Pr. 197.

94 Davis v. Robinson, 10 Cal. 411.

95 Id.

the character or capacity of the defendant is essential, it must be stated in direct and positive terms, or the charge will fail.[96]

§ 2463. Complaint—Causes of action joined.—Where two separate causes of action are joined in one complaint, and defendant is innocent as to one of them, the defendant cannot be arrested on the strength of the other one.[97] Where the action is to recover money collected by a public officer, with interest, the claim for interest is not such a separate cause of action.[98] The fact that one of the plaintiffs is an improper party is not sufficient to vacate an order of arrest.[99]

§ 2464. Complaint—Fraud.—Section 479 (subd. 4) of the California Code of Civil Procedure provides that a defendant may be arrested when he has been guilty of fraud in contracting the debt or incurring the obligation sued on. Section 481 provides that the order of arrest may be made when it appears by affidavit that a cause of action mentioned in section 479 exists. The jurisdiction to issue an order of arrest depends on the affidavit required by section 481, and such order is not void because the complaint does not charge the fraud relied on in the affidavit. In this case the complaint made it evident that a fraud had been committed, but did not charge fraud.[100] Bringing an action on the check of two joint debtors invalidates an arrest of one of them for a separate fraud.[101]

§ 2465. Affidavit for arrest.—The showing prescribed by statute must be made in the affidavit before a warrant is issued; and if arrest is made on an affidavit not showing the required facts, the person obtaining the arrest is liable for false imprisonment.[102] Under a former statute substantially like the present, it was said to be settled that the facts necessary to be shown must appear in the affidavit itself, and that it was not sufficient to refer to the complaint or any other paper, although it is positively averred

96 Porter v. Hermann, 8 Cal. 623.

97 Toffey v. Williams, 5 Thomp. & C. 294; Goodale v. Finn, 4 Thomp. & C. 432.

98 People v. Clark, 45 How. Pr. 12.

99 Webber v. Moritz, 11 Abb. Pr. 113.

100 Ex parte Howtiz, 2 Cal. App. 752, 84 Pac. 229.

101 Woodruff v. Valentine, 19 Abb. Pr. 93.

102 Strozzi v. Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832; Cal. Code Civ. Proc., § 481. See, also, Alaska Codes, pt. 4, ch. 12, § 100; Idaho Rev.

that such paper is true;[103] but if the complaint is annexed to and made a part of the affidavit, the purpose of the law will be complied with. If the complaint is separate from the affidavit, and, as required by law, a copy of the affidavit together with a copy of the order is served upon the defendant when arrested, the law will not be complied with by a reference to a document simply on file in the clerk's office.[104] It seems that if the complaint is before the judge when the order is granted, and the order recites that it appears by affidavit and the complaint duly sworn to that a cause of action exists, etc., it may aid a defective affidavit and be sufficient.[105] A sworn complaint is available as an affidavit, with others, to sustain an order of arrest.[106]

Documents relied on must be presented, or copies furnished.[107] The amount claimed by the plaintiff must be stated positively. "About four thousand nine hundred and thirty dollars" is not sufficient.[108] It is not necessary that deponent should show any connections between him and the plaintiff, as where he is an agent, but it is better to do so.[109]

§ 2466. Affidavit—Departing from the state.—In an action for the recovery of money or damages, on a cause of action arising upon contracts express or implied, when the defendant is about to depart from the state with intent to defraud his creditors,[110] the affidavit must state the facts and circumstances which justify the conclusion that the defendant has removed or disposed of his property, so that the court may be able to draw it from the evidence detailed in the affidavit.[111] Under the California code, an affidavit alleging that on the day the affidavit was made the defendant absented himself from his place of business, and that

Codes, § 4243; Mont. Rev. Codes, § 6598; Nev. Comp. Laws, §§ 3169-3172; Utah Rev. Stats., §§ 3011, 3012; Wash. Bal. Codes, §§ 5464-5467; Wyo. Rev. Stats., §§ 3958-3987.

103 McGilvery v. Moorehead, 2 Cal. 609.

104 Ex parte Howtiz, 2 Cal. App. 752, 84 Pac. 229; Brady v. Bissell, 1 Abb. Pr. 76.

105 Turner v. Thompson, 2 Abb. Pr. 444.

106 Palmer v. Hussey, 59 N. Y. 647; affirming 65 Barb. 278.

107 DeWeerth v. Feldner, 16 Abb. Pr. 295; De Nierth v. Sidner, 25 How. Pr. 419.

108 Tipton's Lessee v. Ross, 10 Ohio, 263.

109 Cal. Code Civ. Proc., § 481.

110 Cal. Code Civ. Proc., § 479, subd. 1; N. Y. Code Civ. Proc., § 550, subd. 2.

111 Smith v. Luce, 14 Wend. 237, note; Ex parte Robinson, 21 Wend. 672; Frost v. Willard, 9 Barb. 440; Castellanos v. Jones, 5 N. Y. 164. Compare Donnelly v. Corbett, 7 N. Y. 500; Van Alstyne v. Erwine, 11 N. Y. 331.

part of his goods were removed to places unknown to the plaintiff, and that, if not prevented, he would escape from the state with his money, and thus defraud the plaintiff, is not sufficient to authorize an arrest,[112] for the reason that "defendant will escape from the state" is a mere conclusion, and not evidence as required by the code.

§ 2467. **Affidavit—On information and belief.**—Sections 478 to 481 of the California Code of Civil Procedure, permitting arrest whenever it appears to the judge, by the affidavit of the plaintiff, that sufficient cause of action exists, and that the case is one of those mentioned in section 479, do not permit the affidavit to be based on information and belief. It must state the facts upon which the information and belief are based.[113] If the affidavit does not state the grounds or facts upon which the information and belief is based, the court has no jurisdiction to issue the order of arrest, and the plaintiff is wholly unprotected against subsequent action for false imprisonment.[114]

Where some of the material allegations of the affidavit are upon information and belief, the sources and nature of the information must be particularly set out, and a good reason given why a positive statement cannot be procured.[115] The rule that one shall not resort to inferior evidence when he has it in his power to produce evidence affording greater certainty of the fact in question applies to an affidavit to obtain an order of arrest, and there is a difference between "stating the sources of information" and "setting them forth."[116]

§ 2468. **Affidavit—Fraud.**—Plaintiff's affidavit must specify and establish the particular fraud relied upon as the foundation of the order. He cannot, upon a motion to vacate the order, set up any ground for retaining it which he has not set forth in the affidavit.[117] Fraud must be clearly proved; if there is a doubt as to the fraud, an order for arrest is not allowable.[118] The character or capacity in which a party is alleged to have received money or property is essential to the charge of fraud, and that

112 Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726.

113 Id.

114 Id.

115 De Weerth v. Feldner, 16 Abb. Pr. 295.

116 Id.; Satow v. Reisenberger, 25 How. Pr. 164. See In re Vinich, 86 Cal. 70, 26 Pac. 528.

117 Cady v. Edmonds, 12 How. Pr. 197.

118 Claflin v. Frank, 8 Abb. Pr. 412.

character or capacity must be positively and directly averred, or the affidavit will be insufficient.[119]

In New York, it has been determined that prior to 1879, when the statute was so amended as to expressly require the complaint to charge the fraud in a case permitting arrest, it was not necessary to charge the fraud in the complaint in order to arrest defendant on mesne process. An affidavit for an order for the arrest of defendant in a civil action which avers that defendant in a foreign country presented to plaintiff a forged check, and obtained thereon foreign coins to the value of six thousand two hundred and ninety dollars, and shortly afterwards took passage for the United States under an assumed name, is sufficient to authorize the court to issue an order for defendant's arrest, under the California statute[120] providing that defendant may be arrested when he has been guilty of fraud.[121] If the affidavit shows a cause of action in the nature of an action on the case for obtaining goods from the plaintiff by fraud, it is not to be inferred that the complaint will not state a cause of action of that nature because the affidavit also alleges that the action is brought to recover the price of goods sold.[122]

§ 2469. Undertaking for an order of arrest.—Before making the order of arrest, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which amount must be at least five hundred dollars in courts of record, and three hundred dollars in a justice's court, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, but not to exceed the sum specified in the undertaking.[123] Court commissioners have authority to approve undertakings.[124] If the action is dismissed, the undertaking must be delivered by the clerk to the defendant, who may have his action thereon.[125]

§ 2470. Undertaking—Sureties.—It seems that the plaintiff himself need not sign the bond or undertaking.[126] In an action

119 Porter v. Hermann, 8 Cal. 624.

120 Code Civ. Proc., § 479, subd. 4.

121 Ex parte Howtiz, 2 Cal. App. 752, 84 Pac. 229.

122 Townsend v. Bogart, 11 Abb. Pr. 355.

123 Cal. Code Civ. Proc., §§ 482, 862.

124 Cal. Code Civ. Proc., § 259, subd. 3.

125 Cal. Code Civ. Proc., § 581.

126 Askins v. Hearns, 3 Abb. Pr. 184; Bellinger v. Gardner, 2 Abb. Pr.

brought for a foreign government, an undertaking executed by an agent appointed to sue is good as an undertaking on the part of the plaintiff.[127]

In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity or on behalf of the state, or any county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, city, or town; but on complying with other provisions of the Code of Civil Procedure, such parties shall have the same rights, remedies, etc., as if such bond, etc., were given and approved.[128]

Though the word "sureties" is used in the statute, yet an undertaking with one surety may, in New York, be accepted as sufficient.[129]

§ 2471. Undertaking—Justification of sureties.—Each of the sureties shall annex to the undertaking an affidavit to the effect that he is a resident and householder or freeholder within the state, and worth the sum specified in the undertaking over and above all his debts and liabilities, exclusive of property exempt from execution.[130] The obligations of bail are assumed with reference to the law, which becomes a part of their contract, and the whole statute must be examined to determine their liability.[131] Where plaintiff was ordered to file security for costs, the undertaking executed by two sureties was sufficient, though only one of them qualified.[132] When the sureties, with knowledge of the facts and circumstances, and without objection, sign the undertaking required by statute to be given before the arrest of a defendant, they cannot afterwards be heard to complain.[133]

§ 2472. Order for arrest.—An order for the arrest of the defendant must be obtained from a judge of the court in which the

441; Courter v. McNamara, 9 How. Pr. 255; Leffingwell v. Chave, 10 Abb. Pr. 472-477.

127 Republic of Mexico v. Arrangois, 11 How. Pr. 1.

128 Cal. Code Civ. Proc., § 1058.

129 Ward v. Whitney, 8 N. Y. 446; Sieff v. Shausenburgh, 10 Abb. Pr. 477, note; Cal. Code Civ. Proc., § 482. See, also, Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454.

130 Cal. Code Civ. Proc., § 482; N. Y. Code Civ. Proc., § 812.

131 Matoon v. Eder, 6 Cal. 58; Cal. Code Civ. Proc., §§ 494-496.

132 Riggins v. Williams, 2 Duer, 678.

133 Vanderberg v. Connolly, 18 Utah, 112, 54 Pac. 1097.

action is brought, or from a county judge.[134] It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned to the clerk of the court in which the action is pending. The order may be granted whenever it may appear to the satisfaction of the judge by the affidavit of the plaintiff or some other person that a sufficient cause of action exists, and that the case is one of those mentioned in the statute. It may be made at the time of issuing the summons, or at any time afterwards before judgment. It may be made returnable within a specified period after arrest, and it is not essential to name a certain day.[135]

The writ of arrest is only an intermediate remedy to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process.[136] As a matter of practice, it is safest to award an arrest in some cases of doubt; for the defendant is protected by his bond from abuse of the process, and without the arrest plaintiff may be without remedy.[137]

§ 2473. **Order—Name of party.**—Formerly it was held that an arrest of a person by a wrong name could not be justified, though he was the person intended, unless he was as well known by one name as the other.[138] But since the adoption of a code it is not necessary that the name of the party to be arrested should be stated; for, if unknown, he may be designated as the real defendant in the suit or proceeding, and whose name is not known, or he may be given a fictitious name.[139]

§ 2474. **Order—How served.**—The order of arrest, with a copy of the affidavit upon which it is made, is placed in the hands of the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest. The sheriff must arrest the defendant and keep him in custody until discharged by order of court or re-

134 Cal. Code Civ. Proc., § 480; N. Y. Code Civ. Proc., §§ 551-556.

135 Continental Bank v. De Mott, 8 Bosw. 696.

136 Matoon v. Eder, 6 Cal. 58. See Banning v. Roy, 47 Or. 119, 114 Am. St. Rep. 908, 82 Pac. 708.

137 Southworth v. Resing, 3 Cal. 377.

138 Mead v. Haws, 7 Cow. 332; Gurnsey v. Lovell, 9 Wend. 319.

139 Pindar v. Black, 4 How. Pr. 95.

leased on bail. He must make a return of the writ within ten days, and if he omits to pay over any money deposited with him, in lieu of bail, as required to be paid to the clerk of the court, he is liable to a penalty of twenty-five per cent, and ten per cent per month interest.[140]

§ 2475. Motion for order to vacate the order of arrest.—The motion for an order to vacate the order of arrest must be made on notice, and must be made in the court, or before the judge who granted the order of arrest, if he is a judge of the court.[141] On motion to vacate an order of arrest, defendant's affidavit, which unequivocally and positively denies the affidavit of the plaintiff, which is equally positive, should be regarded as neutralizing the affidavit of the plaintiff, and plaintiff should produce further proof to make his case good.[142] Also, if the order should be granted on general assertions based on information alone, it will be sufficient, if such allegation is not met by a denial on a motion to discharge defendant from arrest.[143]

When the motion is made on the grounds of a prior attachment, the court may grant plaintiff leave to amend his affidavit to show that said attachment levy is subject to prior liens to the value of the attached property.[144]

§ 2476. Renewal of motion for order to vacate.—After a defendant has moved to vacate an order founded on facts extrinsic to the cause of action, and his motion to vacate is founded only on the plaintiff's original affidavits, if such motion is denied, he should not be allowed to renew it upon opposing affidavits on his own part, especially where the order denying his motion has been affirmed on appeal.[145]

§ 2477. Order—Vacating of, and reducing bail.—A defendant arrested may, at any time before the trial of the action, or, if there be no trial, before the entry of judgment, apply to the judge who made the order, or to the court in which the action is pending, upon reasonable notice, to vacate the order of arrest, or

140 Cal. Code Civ. Proc., §§ 484, 485; N. Y. Code Civ. Proc., § 563. See Cal. Pol. Code, §§ 4161-4164.

141 Rogers v. McElhone, 12 Abb. Pr. 292. See Cal. Code Civ. Proc., § 503.

142 Allen v. McCrasson, 32 Barb. 662.

143 Wolfe v. Brouwer, 5 Robt. 601.

144 Chapman v. H. D. Lee Mercantile Co., 60 Kan. 858, 56 Pac. 749.

145 Lovell v. Martin, 12 Abb. Pr. 178.

to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.[146]

If, upon such application, it appears that there was not sufficient cause for arrest, the order shall be vacated; or if it appears that the bail was fixed too high, the amount must be reduced.[147] An order of arrest should not be vacated on the ground that an action has been brought in a foreign court against the defendant for the same cause, it not appearing that any arrest was ever made there, or would have been allowed by the practice of such court.[148]

In an action for a conversion, an order of arrest cannot be vacated on mere denial of the cause of action.[149] On a motion to vacate an order of arrest on an allegation of fraud, the question of fact involved in it must be decided, like any other fact, by the weight of evidence.[150] An order of arrest should not be vacated merely on the ground that one of the plaintiffs is not a proper party.[151] An objection to the validity of the arrest, because of alleged defects in the warrant, cannot be urged after the defendant has given recognizance bond.[152]

§ 2478. **Order—Where made.**—The order may be made at chambers by the judge who granted the original writ. Otherwise, in New York, it must be made at special term.[153] The superior court is always open for the purpose of hearing motions of this character.[154] The district judge has authority to hear such motions, and to permit amendments to the plaintiff's affidavit, while in chambers.[155]

§ 2479. **Grounds for discharge of defendant.**—Defendant will be discharged from arrest where the process has been issued in an improper case.[156] When once arrested and discharged, de-

146 Cal. Code Civ. Proc., § 503.

147 Cal. Code Civ. Proc., § 504.

148 Arthurton v. Dalley, 20 How. Pr. 311.

149 Cousland v. Davis, 4 Bosw. 619.

150 Southworth v. Resing, 3 Cal. 378.

151 Webber v. Moritz, 11 Abb. Pr. 113.

152 State v. Eldred, 8 Kan. App. 625, 56 Pac. 153.

153 Dunaher v. Meyer, 1 Code Rep. 87; Cayuga County Bank v. Warfield, 13 How. Pr. 439; Cal. Code Civ. Proc., § 503.

154 Cal. Code Civ. Proc., § 76.

155 Chapman v. H. D. Lee Mercantile Co., 60 Kan. 858, 56 Pac. 749.

156 Soule v. Hayward, 1 Cal. 345.

fendant cannot be arrested again in the same action.[157] A discharge under the insolvent act, after judgment, precludes a second imprisonment for the same cause in a different form.[158] Defendant must at any time prior to execution, either upon giving bail or upon depositing the amount mentioned in the order of arrest, be discharged.[159] Defendant will be discharged if the order of arrest was executed beyond the territorial limits of the county in which it is issued.[160]

§ 2480. Conditional discharge.—Defendant may be discharged conditionally, upon his own stipulation not to bring an action against the plaintiff and his sureties for the arrest,[161] or where the question involved in the motion to discharge the defendant is one involved in uncertainty, and about which there has been much diversity of opinion. But in either case it seems that defendant is or is not entitled to an unconditional discharge.[162]

If in a justice of the peace court the trial is postponed, on application of plaintiff, for more than three hours, and the defendant is under arrest, the postponement discharges the defendant from custody; but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged.[163]

§ 2481. Examples of wrongful arrest.—Arresting a person without intending to take him before a magistrate for trial is a fraudulent imprisonment, since an arrest is merely a step in the prosecution, and must be made with a view thereto. In this case one party suspected another of taking some money he had lost.[164] The object of arrest is to protect private rights, and where a warrant is procured and none is authorized by statute, and arrest is made on the order, it is false imprisonment.[165] The presumption is that a person wrongfully arrested and illegally

157 McGilvery v. Morehead, 2 Cal. 607.

158 Wright v. Ritterman, 1 Abb. Pr. (N. S.) 428; People v. Kelly, 1 Abb. Pr. (N. S.) 432.

159 Cal. Code Civ. Proc., § 486; N. Y. Code Civ. Proc., § 573.

160 In re Baum, 61 Kan. 117, 58 Pac. 958.

161 Northern Ry. Co. v. Carpentier, 4 Abb. Pr. 47.

162 Alden v. Sarson, 4 Abb. Pr. 102. Compare Merchant's Bank v. Dwight, 13 How. Pr. 366; Croden v. Drew, 3 Duer, 652.

163 Cal. Code Civ. Proc., § 876, subd. 2.

164 Garnier v. Squires, 62 Kan. 321, 62 Pac. 1005.

165 Strozzi v. Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832.

held in custody did not consent to the wrong nor waive the illegality.[166] A fraudulent transferee of an insolvent's property is not subject to arrest under section 15 of article I of the Constitution of California and section 479. of the Code of Civil Procedure, in an action brought by the insolvent's assignee to recover the property.[167] The order for arrest is not good beyond the territorial limits of the county in which it is issued.[168]

§ 2482. **Bail.**—The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest that the defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.[169]

§ 2483. **Bail—Amount of.**—Under the former practice, in money demands on contract, the amount of bail required was double the amount of the claim, but subject to modification where the amount was very large.[170] In other actions the bail is within the discretion of the court, and depends upon the character of the action and the position of the defendant, whether, for example, they are residents or transient persons.[171] In California, the amount of the undertaking must be at least five hundred dollars in the superior court and three hundred dollars in the justice of the peace court.[172]

§ 2484. **Bail—Effect of giving.**—The defendant, on arrest, by giving bail and neglecting to move to be discharged, consents to process, and waives all previous irregularities.[173]

§ 2485. **Bail—Qualification of sureties.**—The qualifications of bail are as follows: 1. Each of them must be a resident of the

166 In re Baum, 61 Kan. 117, 58 Pac. 958.

167 Cooper v. Nolan, 138 Cal. 248, 71 Pac. 179.

168 In re Baum, 61 Kan. 117, 58 Pac. 958.

169 Cal. Code Civ. Proc., § 487; N. Y. Code Civ. Proc., § 575.

170 Cromelines ads. Beldens, 1 Wend. 107; Ballingall v. Burnie, 1 Hall, 237.

171 Baker v. Swackhamer, 3 Code Rep. 248.

172 Cal. Code Civ. Proc., §§ 482, 862.

173 Matoon v. Eder, 6 Cal. 58.

state and a householder, or freeholder within the state; 2. Each must be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in the code, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.[174] It is no objection to persons offered as bail that they have received transfers of property without consideration from friends of the defendant, to enable them to qualify as bail.[175]

§ 2486. **Bail—Justification of.**—For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or county clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff.[176] The sureties must answer fairly, and, if from their refusal to answer pertinent and material questions or otherwise, it appear that they cannot respond in the necessary amounts, they should be rejected.[177]

§ 2487. **Bail—Notice of justification of.**—Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail, specifying the places of residence and occupations of the latter, before a judge of the court or county clerk, at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case of other bail being given, there must be a new undertaking.[178]

§ 2488. **Bail—Exception to offered by defendant.**—Within ten days after the return of the sheriff, with a copy of the undertak-

174 Cal. Code Civ. Proc., § 494; N. Y. Code Civ. Proc., § 579.

175 People v. Ingersoll, 14 Abb. (N. S.) 23.

176 Cal. Code Civ. Proc., § 495.

177 Mokelumne Hill Co. v. Woodbury, 10 Cal. 189.

178 Cal. Code Civ. Proc., § 493; N. Y. Code Civ. Proc., § 578.

ing of bail, plaintiff may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court.[179]

A notice of exception to the sufficiency of the undertaking is not sufficient as a notice of exception to the sufficiency of the sureties.[180]

§ 2489. Bail—Allowance of.—If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability.[181]

§ 2490. Bail—Exoneration of sureties by surrender of defendant.—At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.[182] The sureties on the bail-bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody.[183] A surrender within ten days after execution is a sufficient compliance with the statute.[184] Where a party offered to surrender himself in discharge of his sureties, it was held to be a good surrender, and a discharge of the sureties from all liability.[185] Where the judgment is such as will not warrant a writ of *capias ad satisfaciendum* to be issued under it, the bail will not be charged for negligence in not surrendering the judgment debtor.[186] Using their utmost diligence to effect the surrender of the defendant is not sufficient to exonerate the sureties.[187]

§ 2491. Bail—Exoneration of the sureties by death of defendant.—The bail are exonerated by the death of the defendant, or

179 Cal. Code Civ. Proc., § 492; N. Y. Code Civ. Proc., § 577.

180 Young v. Colby, 2 Code Rep. 68.

181 Cal. Code Civ. Proc., § 496; N. Y. Code Civ. Proc., § 581.

182 Cal. Code Civ. Proc., § 488; N. Y. Code Civ. Proc., § 591.

183 Allen v. Breslauer, 8 Cal. 552.

184 Id.

185 Babb v. Oakley, 5 Cal. 93.

186 Matoon v. Eder, 6 Cal. 58.

187 Baker v. Curtis, 10 Abb. Pr. 279.

by his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process.[188]

§ 2492. Bail—Exoneration of sureties by arrest of defendant.—The bail, at any time or place before they are finally charged, may themselves arrest defendant, or by written consent and authority, indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter.[189] It is not necessary that all the bail unite in giving this authority.[190]

§ 2493. Bail—Action on bond.—In an action on a bail-bond, it is no defense to the action that defendant was in attendance at court during the whole trial, and had remained within the jurisdiction of that court for a few days after the rendition of judgment against him. And the failure of the sheriff to return the writ of arrest before judgment was rendered makes no defense in suit on the bond. The Oregon statutes,[191] which differ from the statutes of California and Washington, provide that a warrant of arrest may issue in a civil action when the defendant has been provisionally arrested or an order has been made authorizing his arrest and is still in force, and the execution against his property has been returned unsatisfied in whole or in part; and it does not matter that the judgment did not show the issuance of the writ of arrest, or an order therefor, or direct an execution against the person of defendant.[192]

188 Cal. Code Civ. Proc., § 491; N. Y. Code Civ. Proc., § 601; Merritt v. Thompson, 1 Hilt. 550.

189 Cal. Code Civ. Proc., § 489; N. Y. Code Civ. Proc., § 593. See, also, Alaska Codes, pt. 4, ch. 12, § 103; Idaho Rev. Codes, § 4251; Mont. Rev. Codes, § 6606; Nev. Comp. Laws, §§ 3169-3172; Or. B. & C. Codes, § 264; Utah Rev. Stats., §§ 3019, 3020; Wash. Bal. Codes, §§ 5474, 5475; Wyo. Rev. Stats., §§ 3979, 3980.

190 In re Taylor, 7 How. Pr. 212.

191 B. & C. Codes, §§ 214, 218, 260.

192 Banning v. Roy, 47 Or. 119, 114 Am. St. Rep. 908, 82 Pac. 708. See, contra, Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367; Matoon v. Eder, 6 Cal. 58; Davis v. Robinson, 10 Cal. 411; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

FORMS IN ARREST AND BAIL.

§ 2494. Affidavit by third persons.

Form No. 670.

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I am an agent of the above-named plaintiff A. B., at . . . [State the nature of the agency, and continue as in succeeding forms.]

§ 2495. Affidavit for order of arrest—Departing out of the state with intent to defraud creditors.

Form No. 671.

[TITLE.]

STATE OF CALIFORNIA, } ss.
. . . COUNTY OF . . . }

. . . , being duly sworn, says: That . . . is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an . . . contract, and that the defendant in said action is about to depart from this state with intent to defraud his creditors.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to-wit: [State facts.]

[JURAT.] [SIGNATURE.]

§ 2496. Affidavit showing that money has been received by defendant in a fiduciary capacity.

Form No. 672.

[TITLE.]

[VENUE.]

. . . , being duly sworn, says: That he is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff, against said defendant, for the sum of . . . dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of

this affidavit; that it is an action for the recovery of money received by the defendant as a broker, in the course of his employment as such, and by him fraudulently converted to his own use; and affiant further states and shows the following facts and circumstances in support of the above allegation of fraud and conversion, to-wit: that on the . . . day of . . ., 19 . ., at . . ., he delivered to the defendant C. D., of . . ., who was then and there a broker, a promissory note made by E. F., to the order of the plaintiff, dated the . . . day of . . ., 19.., and payable . . . months after date, for the sum of . . . dollars, and indorsed by plaintiff, for sale on plaintiff's account, but for no other purpose whatever; that he gave no authority to the said C. D. to retain the proceeds of said note, or any part thereof, for any time whatever; that on the . . . day of . . ., 19.., the said defendant C. D. sold the said note and received therefor the sum of . . . dollars, in lawful money of the United States, of which sum this affiant was then and there entitled to receive the sum of . . . dollars; that he has demanded the said sum last named from said C. D., but he has not paid or accounted for the same, or any part thereof [and wholly refuses so to do].

[JURAT.] [SIGNATURE.]

§ 2497. Affidavit for order of arrest—Fraudulent debtor.

Form No. 673.

[TITLE.]

[VENUE.]

. . ., being duly sworn, says: That . . . is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant, for the sum of . . . dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an [express] contract, and that the defendant in said action has been guilty of a fraud in contracting the debt and incurring the obligations for which the said action is brought.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to-wit [state fully and particularly all the facts relied upon as constituting and proving the fraud. If any of the material averments are made upon information and belief, state the sources of in-

formation, and why the affidavit of a person having personal knowledge is not presented. If documents or papers are referred to as a source of information, and these are not in affiant's possession or under his control, attach copies thereof properly referred to, or show why copies cannot be procured].

[JURAT.] [SIGNATURE.]

§ 2498. Affidavit for order of arrest—Removal of property with intent to defraud.

Form No. 674.

[TITLE.]

[VENUE.]

. . . , being duly sworn, says: That . . . is the plaintiff in the above-entitled action; that a sufficient cause of action exists in favor of plaintiff against said defendant for the sum of . . . dollars, as fully appears from the verified complaint herein, a copy of which complaint is hereto annexed and made a part of this affidavit; that it is an action for the recovery of money on a cause of action arising upon an . . : contract, and that the defendant in said action is about to remove and dispose of his property with intent to defraud . . . creditors.

And affiant further states and shows the following facts and circumstances in support of the above allegations of fraud, to-wit: [State them fully.]

[JURAT.] [SIGNATURE.]

§ 2499. Affidavit of sheriff to accompany above.

Form No. 675.

[TITLE.]

[VENUE.]

E. F., being duly sworn, says: That he is the sheriff of . . . county; that he has read the foregoing affidavit of A. B.; that on the . . . day of . . . , 19.., upon the requisition of said A. B., and due undertaking given and approved by affiant, he made search for and attempted to take the property described in the foregoing affidavit, but that the same could not be found after diligent search and inquiry; and that said defendant C. D. refused to inform this affiant where the said property was, but told the affiant that he had concealed it to prevent the same being taken in this action:

[JURAT.] E. F.

§ 2500. Undertaking on order of arrest.

Form No. 676.

[TITLE.]

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the state of . . . , in and for the city of . . . , county of . . . , against the above-named defendant, and is about to apply for an order for the arrest of the said defendant in said action:

Now, therefore, we, the undersigned, residents of the county of . . . , in consideration of the premises, and of the issuing of said order of arrest, do undertake in the sum of . . . dollars, and promise to the effect that if the said defendant recover judgment, the said plaintiff will pay all costs and charges that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum of . . . dollars.

O. P.,
Q. R.

[DATE.]

§ 2501. Affidavit of qualification.

Form No. 677.

STATE OF CALIFORNIA, } ss.
. . . COUNTY OF . . . }

. . . and . . . , the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is a resident and . . . holder within this state, and is worth the sum specified in the said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

[JURAT.] [SIGNATURES.]

§ 2502. Indorsement of judge's approval.

Form No. 678.

I approve the within undertaking, and the sufficiency of the sureties therein named.

[DATE.] [SIGNATURE.]

§ 2502a. Order of arrest.

Form No. 679.

[TITLE.]

The People of the State of California to the Sheriff of the City of . . . , County of . . .

The above-named plaintiff having commenced an action in the superior court of the state of . . ., in and for the . . . county of . . ., against the above-named defendant, and it duly appearing to me, from affidavits submitted on the part of the said plaintiff, that a sufficient cause of action exists, that the case is one of those mentioned in section 479 of the Code of Civil Procedure of this state, to wit:

That the said defendant has been guilty of fraud in contracting the debt for which the said action is brought, and the necessary undertaking having been given, I, the undersigned, judge of the said superior court, by virtue of the authority in me vested by law, do order and require you, the said sheriff of . . . county of . . ., forthwith to arrest the said defendant if he be found in your county, and hold him to bail in said action in the sum of . . . dollars, and that you return this order, with your proceedings thereon, to the clerk of the said superior court on or before the . . . day of . . . , 19 . .

[DATE.] G. H., Judge.

§ 2503. Return—Arrest of defendant.

Form No. 680.

[TITLE.]

[VENUE.]

I have taken and arrested the within-named C. D., whose body I have ready, as required by the within order.

A. C., Sheriff of . . . County.

§ 2504. Return—Defendant not found.

Form No. 681.

[VENUE.]

The within-named A. B. is not found in my county.

A. C., Sheriff of . . . County.

§ 2505. Return—One arrested, the other not found.

Form No. 682.

[VENUE.]

I have taken and arrested the within-named A. B., whose body I have ready, as required by the within order; but the within-named C. D. is not found in my county.

A. C., Sheriff of . . . County.

§ 2506. Return—Imprisoned for want of bail.

Form No. 683.

[VENUE.]

I have taken and arrested the within-named C. D., who remains imprisoned in the common jail of the county of . . ., in my custody, for want of bail.

A. C., Sheriff of . . . County.

§ 2507. Return—Arrest, and escape by rescue.

Form No. 684.

[VENUE.]

I have taken and arrested the within-named C. D., as required by the within order, and safely kept him in my custody until divers persons, to me unknown, on the . . . day of . . ., 19.., at . . ., with force and arms assaulted me, and out of my custody rescued said C. D., who then and there rescued himself and escaped out of my custody, and afterwards the said C. D. is not found in said county.

A. C., Sheriff of . . . County.

§ 2508. Return—That defendant has made deposit in lieu of bail.

Form No. 685.

[VENUE.]

I have taken and arrested the within-named A. B., as required by the within order, and he has deposited with me . . . dollars, in lieu of bail in the above-entitled action.

A. C., Sheriff of . . . County.

§ 2509. Clerk's certificate that deposit has been paid into court.

Form No. 686.

[TITLE.]

[VENUE.]

I, J. K., clerk of the county of . . ., hereby certify that the sheriff of said county has deposited in this court the sum of

. . . dollars, as having been paid him by C. D., the defendant, in lieu of an undertaking of bail in this action.

J. K., Clerk of . . . County.

§ 2510. Certificate that bail has been given instead of deposit.

Form No. 687.

[TITLE.]

[VENUE.]

I, A. K., sheriff of the county of . . ., hereby certify that the defendant, C. D., has deposited with me an undertaking, of which the within is a copy, in lieu and instead of the money heretofore deposited with me.

A. K., Sheriff of . . . County.

§ 2511. Return to order of discharge on supersedeas.

Form No. 688.

[VENUE.]

By virtue of the within order to me directed, I took the within-named defendant and safely kept him in my custody in the common jail of the county of . . ., until afterwards, to-wit, on the . . . day of . . ., 19.., by virtue of a certain other writ to me directed and delivered, and to this writ annexed, I caused the said defendant to be delivered out of the said jail; wherefore I cannot have the body of the said defendant before the said superior court of the county of . . ., state of . . ., as within I am commanded.

A. K., Sheriff of . . . County.

§ 2512. Return to order of delivery on writ of habeas corpus.

Form No. 689.

[VENUE.]

By virtue of the within order, to me directed, I took and arrested the within-named defendant and safely kept him in my custody, in the common jail of the county of . . ., until afterwards, to-wit, on the . . . day of . . ., 19.., I received the writ of *habeas corpus cum causa,* commanding me to have the body of the said defendant before the justices of the supreme court of the state of California [or as the case may be], at . . ., on the . . day of . . ., then next [or, immediately after the receipt of that writ]. By virtue of which said writ, and in obedience thereto,

I had the body of the said defendant with the said last-mentioned writ, and the return of the within cause in a certain schedule thereunto annexed, before the said justices of the supreme court of the state of California [or as the case may be], at the day and place in the said writ contained, who then received of me the body of the said defendant, and discharged him out of my custody [or, committed him to the jail of the county of . . .], and altogether discharged and exonerated me from further keeping the said defendant.

Wherefore, I cannot have the body of the said defendant before the said superior court in the within order named, as I am therein commanded.

A. K., Sheriff of . . . County.

§ 2513. Notice of motion to vacate order of arrest.

Form No. 690.

[TITLE.]

To E. F., Plaintiff's Attorney:

Please take notice, that on the . . . day of . . ., 19.., at the courtroom of said court, at the opening of the court, or as soon thereafter as counsel can be heard, the undersigned will move this court to vacate the order of arrest in this action. This motion will be based upon the affidavit hereto annexed, and upon the papers filed and served in this action, and said motion will be made for irregularity in this, that the undertaking given to procure said order was not filed with the clerk of the court [or otherwise], and for such other and further order as may be just.

[DATE.] [SIGNATURE.]

§ 2514. Order vacating arrest.

Form No. 691.

[TITLE.]

I. On reading and filing notice of motion and affidavit thereto annexed, and on the pleadings and proceedings in this action, on motion of E. F., counsel for the defendant, and after hearing thereon—

II. It is hereby ordered that the order of arrest granted in this action, on the . . . day of . . ., 19.., against the defendant, A. B., be vacated [and that the bail heretofore given for the defendant be exonerated from liability].

[DATE.] [SIGNATURE.]

§ 2515. Order vacating arrest on condition that defendant will not sue.

Form No. 692.

[TITLE.]

[Commencement as in last form.]

It is hereby ordered that on defendant's stipulating within . . . days to bring no action for false imprisonment, said motion be granted, and the order of arrest heretofore granted in this action be vacated [or, that the defendant be discharged from said arrest], with . . . dollars costs to the defendant; otherwise, that said motion be denied, without costs.

§ 2516. Order reducing amount of bail.

Form No. 693.

[TITLE.]

[Commencement as before.]

It is hereby ordered, that the bail to be taken by the sheriff on the order of arrest of C. D. in this action be reduced to . . . dollars.

[DATE.] [SIGNATURE.]

§ 2517. Notice of motion to discharge defendant from arrest—Another form.

Form No. 694.

[TITLE.]

To A. B., Plaintiff's Attorney:

Please take notice, that on the . . . day of . . ., 19. . , at the courtroom of said court, at the opening of the court, or as soon thereafter as counsel can be heard, the undersigned will move this court that the defendant, C. D., be discharged from arrest in this action [or, that the amount of bail required by the order of arrest in this action be reduced]. Said motion will be based on the affidavit, a copy of which is annexed, and upon all the papers filed and served in this action.

[DATE.] [SIGNATURE.]

§ 2518. Undertaking of defendant on arrest.

Form No. 695.

[TITLE.]

Whereas, in a certain action in the superior court of the state of . . . , in and for the . . . county of . . . , wherein A. B.

is plaintiff and C. D. defendant, an order was duly made and delivered to the sheriff of the city and county of . . ., requiring him forthwith to arrest the said defendant, and hold him to bail in the sum of . . . dollars, and the said sheriff having arrested the said defendant and taken him into custody by virtue of the said order:

Now, therefore, we L. M. and N. O., the said L. M., residing at . . ., in the county of . . ., by occupation a [merchant], and N. O., residing at . . ., in the county of . . ., by occupation a [carpenter], are jointly and severally bound in the sum of . . . dollars, the amount in the said order of arrest mentioned, and promise and undertake that the said defendant shall at all times render himself amenable to the process of the said court during the pendency of the said action, and to such as may be issued to enforce the judgment therein; or that we will pay to the said plaintiff the amount of any judgment which may be recovered in the said action.

[DATE.] [SIGNATURES AND SEALS.]

[Affidavit of qualification as in No. 677.]

§ 2519. Justification of bail.

Form No. 696.

[TITLE.]

On this . . . day of . . ., 19. . , before the undersigned, J. P., judge of [state the court; or, G. H., the county clerk of the county of . . .], personally appeared L. M. and N. O., the bail of the defendant C. D. in this action, to justify pursuant to notice; and the said L. M., being duly sworn, says: [Here state testimony, inserting, if desired, the questions and answers in form.] And said N. O., being duly sworn, says: [As above.]

[SIGNATURES OF BAIL.]

§ 2520. Allowance of bail.

Form No. 697.

This day appeared before me the within-named L. M. and N. O., bail for the defendant C. D. in this action, and justified as such, and I find said bail to be sufficient, and allow the same.

[Or, that L. M., merchant, of No. . . . Front street, San Francisco, and N. O., banker, of No. . . . Montgomery street, San

Francisco, are proposed as bail in addition to [or, in lieu of] R. S. and T. U., the bail already put in, and that they will justify.]

[DATE.] [SIGNATURE.]

§ 2521. Notice of bail justifying.

Form No. 698.

[TITLE.]

To . . ., Plaintiff's Attorney:

Please take notice that the bail in this action will justify before M. N., a justice of this court [or, county judge; or, the county clerk of . . . county], at . . ., on the . . . day of . . . next, at . . . o'clock in the . . . noon.

[DATE.] [SIGNATURE.]

§ 2522. Notice of exception to bail.

Form No. 699.

[TITLE.]

To the Sheriff of . . . County:

Please take notice, that the plaintiff does not accept the bail offered by the defendant, C. D., in this action. [And where there is objection to the undertaking:] And further, that he excepts to the form and sufficiency of the undertaking.

[DATE.] [SIGNATURE.]

§ 2523. Authority to arrest principal.

Form No. 700.

Know all men, etc., that I, L. M., the within-named bail, depute, authorize, and empower, in my place and stead, and in my behalf, O. P., of . . ., sheriff of . . ., to take, arrest, seize, and surrender C. D., the within-named defendant, in exoneration and discharge of my undertaking as bail for the said C. D. in said cause.

[DATE.] [SIGNATURE.]

§ 2524. Certificate of surrender.

Form No. 701.

[VENUE.]

I, S. T., sheriff of the county of . . ., hereby certify that C. D., the principal mentioned in the [within] undertaking [or, if not

indorsed, refer to the undertaking so as to identify it], was surrendered to me by L. M. and N. O., his sureties, this . . . day of . . ., 19.., and remained in custody.

S. T., Sheriff of . . . County.

§ 2525. Notice of motion for enlargement of time to surrender.

Form No. 702.

[TITLE.]

[ADDRESS.]

Please take notice, that on the affidavit, a copy of which is herewith served, the undersigned will move this honorable court, on the . . . day of . . . next, at . . . o'clock, A. M., at . . ., or as soon thereafter as counsel can be heard, that the undersigned, bail of the defendant, C. D., in this action, have . . . days further time to surrender the defendant to the sheriff in exoneration of the bail herein, and for such other or further order as may be just.

[DATE.] [SIGNATURE.]

§ 2526. Affidavit to support motion for enlargement of time for surrender.

Form No. 703.

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says:

I. I am one of the bail of the defendant, C. D., in this action; that said C. D. was arrested on the . . . day of . . ., 19.., by virtue of an order of arrest, on the ground that [state the ground of arrest], and that on the . . . day of . . ., 19.., the deponent [and N. O.] became bail for said defendant by giving an undertaking, of which a copy is hereto annexed.

II. [State excuse for not having surrendered in season, and what means the bail took to ascertain where the principal was, and to effect his surrender.]

III. [State facts showing that a surrender is possible.]

IV. That no action has been commenced against the bail, as deponent is informed and believes.

[JURAT.] [SIGNATURE.]

CHAPTER LXXXVI.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 2527. In general.—The statute provides the remedy of claim and delivery of personal property, which is a substitute for the former action of replevin, and is, at least, commensurate with the action of detinue at common law.[1] The action for recovery of personal property under the code procedure is substantially the former action of replevin, and is governed by the same principles and rules, especially in relation to demand and refusal.[2] It is a statutory remedy provided to enable one to recover the possession of personal property wrongfully detained, with an alternative remedy, if possession cannot be had.[3]

The plaintiff may at the time of issuing summons, or at any time before answer, claim the delivery of such property to him.[4] He must claim the delivery under this section before answer, or not at all; but his failure to do so does not affect the question of ultimate relief.[5] At common law, replevin did not lie unless there had been an unlawful taking from the possession of another. Hence. for an unlawful detention or conversion of goods deposited with a bailee, detinue or trover, and not replevin, was the proper action.[6] But the practice is regulated by the various states. In California, claim and delivery lies where the plaintiff is owner of or entitled to the possession of the property which is wrongfully detained by the defendant.[7] It has been held that replevin will not lie by one joint owner; but the objection can only be taken by a plea in abatement where he sues for the whole. If he sues for a moiety, the court will abate the writ.[8] Neither of the tenants

1 McLaughlin v. Piatti, 27 Cal. 452.

2 Moser v. Jenkins, 5 Or. 447. See Surles v. Sweeney, 11 Or. 23, 4 Pac. 469; Guille v. Fook, 13 Or. 585, 11 Pac. 277.

3 Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414; Washburn v. Huntington, 78 Cal. 573, 21 Pac. 305.

4 Cal. Code Civ. Proc., § 509; N. Y. Code, § 206.

5 Wellman v. English, 38 Cal. 583.

6 Meany v. Head, 1 Mason, 319, Fed. Cas. No. 9379.

7 Cal. Code Civ. Proc., § 510. See, also, Alaska Codes, pt. 4, ch. 13, § 124; Ariz. Civ. Code, par. 3812; Idaho Rev. Codes, § 4272; Mont. Rev. Codes, § 6623; Nev. Comp. Laws, § 2195; Or. B. & C. Codes, § 285; Utah Rev. Stats., § 3046; Wash. Bal. Codes, §§ 4119, 5427; Wyo. Rev. Stats., § 4146.

8 D'Wolf v. Harris, 4 Mason, 515, Fed. Cas. No. 4221; decided under a statute not similar to that of California.

in common of personal property, where there is an agreement that it shall be delivered by one to the other, to be sold, or shipped to a commission merchant and sold, and the proceeds equally divided, can maintain replevin against the other, nor against the vendee of the other, to recover it.[9]

Equities are properly adjudicated in statutory actions of replevin.[10] But replevin is not a chancery proceeding which can be invoked for the cancellation of a contract.[11] It is not proper to make a replevin action the means of litigating and determining the title to real property as between the original owner and the tax-title claimant in adverse possession under a tax-deed.[12]

§ 2528. Property subject to replevin.—Replevin does not lie to recover shares in a corporation, as they are incorporeal and intangible property, incapable of seizure.[13] Where defendant, while in actual possession of certain real estate, and claiming title in good faith, sells a house thereon to another defendant, who removes the house, plaintiff, who claims to be the real owner of the land, cannot bring an action of claim and delivery for the house.[14] Nor can replevin be had to recover an undivided interest in a certain number of bales of hops varying in weight and quality;[15] nor to recover slot-machines, which have no legitimate use.[16] Deer hides unlawfully in possession of plaintiff under the game laws of the state, and seized by the game warden, cannot be recovered in an action of claim and delivery, because plaintiff's possession is unlawful.[17] The holder of the legal title to real property attached, who is entitled to its immediate possession, may maintain an action of claim and delivery against the sheriff, though at the time of the levy it was in possession of a third party.[18]

§ 2529. Title and right of plaintiff to the property.—General or special ownership in plaintiff must be pleaded.[19] Possession by

9 Hewlett v. Owens, 50 Cal. 474.

10 McFadyen v. Masters, 11 Okla. 16, 66 Pac. 284.

11 Penton v. Hansen, 13 Okla. 450, 73 Pac. 843.

12 Rees v. Higgins, 9 Kan. App. 832, 61 Pac. 500.

13 Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624; Bell v. Bank of California, 153 Cal. 234, 94 Pac. 889.

14 Hines v. Good, 128 Cal. 38, 79 Am. St. Rep. 22, 60 Pac. 527.

15 Schwarz v. Lee Gon, 46 Or. 219, 80 Pac. 110

16 Mullen & Co. v. Moseley, 13 Idaho, 457, 12 Am. St. Rep. 277, 90 Pac. 986, 12 L. R. A. (N. S.) 394.

17 Hornbeke v. White, 20 Colo. App. 13, 76 Pac. 926.

18 Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306.

19 Street v. Sederburg, 41 Colo. 128, 92 Pac. 29.

the plaintiff, and an actual wrongful taking by the defendant, are necessary to support the action of replevin.[20] The right to the possession of personal property is essential to the plaintiff in an action for claim and delivery;[21] and he must be entitled to the immediate and exclusive possession.[22] But the ownership requisite to maintain the action need not be absolute; a right to the possession and dominion over the property for the time is sufficient.[23] The right of a mortgagee after default of the mortgagor is sufficient.[24]

Plaintiff, in replevin to recover goods levied on under an execution, but returned under a forthcoming bond, has no right of action.[25] In claim and delivery for the wrongful seizure of property under an execution, plaintiff must recover upon the strength of his own title; and he must show that he was the owner or had a special interest therein, and that the property is wrongfully detained.[26] Where plaintiff is entitled to the possession of the chattels at the time of trial, a return to defendant will not be ordered, though plaintiff was not entitled to such possession when the action began.[27]

Where plaintiff sold cattle to defendant, to be kept for three years, and defendant unlawfully sold part of the cattle, plaintiff cannot bring a replevin suit to recover the other cattle before the end of the three years.[28] A lessee need not resort to trespass, but may use replevin, to recover goat-hides taken from goats unlawfully killed on his leased land.[29] No recovery can be had by an insolvent's assignee in an action against an execution creditor for claim and delivery, where it is found that the plaintiff is not, and never has been, the owner of the property, and is not entitled to the possession of it, and that none of it was in defendant's possession at the beginning of the suit.[30]

20 Dickson v. Mathers, Hempst. 65, Fed. Cas. No. 3898a; McArthur v. Hogan, Hempst. 286, Fed. Cas. No. 8659a.

21 Bach etc. Co. v. Montana Lumber Co., 15 Mont. 345, 39 Pac. 291.

22 Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684; Cameron v. Wentworth, 23 Mont. 70, 57 Pac. 648.

23 Lewis v. Birdsey, 19 Or. 164, 26 Pac. 623.

24 Ely v. Williams, 6 Cal. App. 455, 92 Pac. 393.

25 Rachofsky & Co. v. Benson, 19 Colo. App. 178, 74 Pac. 657.

26 Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583; Robb v. Dobrinski, 14 Okla. 563, 78 Pac. 101.

27 Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434.

28 Penton v. Hansen, 13 Okla. 450, 73 Pac. 843.

29 Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

30 Keech v. Beatty, 127 Cal. 177, 59 Pac. 837.

A chattel mortgagee may maintain replevin for the chattels where the mortgage gives him a right of possession.[31] Likewise, where books are sold under a contract by which title does not pass until the books are fully paid for, plaintiff may maintain replevin to recover possession of them on defendant's failure to pay off the notes given as evidence of the debt as they became due.[32]

The maker of notes is not the owner, nor is he entitled to the immediate possession thereof, unless the same have been paid or canceled by a decree of court, or for other reasons have become absolutely void as obligations in the hands of the payee or of third parties; and an action in replevin by the maker for the recovery of possession of such notes will not lie.[33] The assignee of a note secured by mortgage on wheat in the hands of an assignor, under an agreement of purchase from the mortgagor, may sue in replevin for the wheat, either as mortgagor or as owner of such wheat.[34]

On the other hand, where the breach of the mortgage contract has been merely apparent, and the mortgagee has seized the goods for non-payment, and is guilty of breach of warranty, the mortgagor is not deprived of title so as to be precluded from bringing an action in replevin for the chattels.[35] Where defendant agrees to rescind a sale and return the goods to the former owner, so that he may pay off plaintiff, plaintiff may maintain replevin against defendant on his failure to do so.[36]

§ 2530. Possession of defendant.—Replevin cannot be maintained against one not in actual or constructive possession of the property.[37] But the taking need not be by defendant; the action lies against all persons in whose possession personal property, unlawfully taken, may be found, except officers of the law who have possession by virtue of a legal process.[38] The relief sought in claim and delivery cannot be had from the defendant unless he

31 Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434; Schlessinger v. Cook, 9 Wyo. 256, 62 Pac. 152.

32 Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111.

33 Olson v. Thompson, 6 Okla. 576, 52 Pac. 388.

34 Sehrt-Patterson Milling Co. v. Levan, 9 Kan. App. 523, 58 Pac. 275.

35 Hennessey v. Barnett, 12 Colo. App. 254, 55 Pac. 197.

36 De St. Aubin v. Marshall Field & Co., 27 Colo. 414, 62 Pac. 199.

37 Robb v. Dobrinski, 14 Okla. 563, 78 Pac. 101; Richards v. Morey, 133 Cal. 437, 65 Pac. 886.

38 Murphy v. Tindall, Hempst. 10, Fed. Cas. No. 9952a. Compare Williamson v. Ringold, 4 Cranch C. C. 39, Fed. Cas. No. 17755.

is then possessed of the property, which fact constitutes an essential element in the cause of action.[39]

The archives of any department of the United States government are not in the possession of the head of the department, chief of bureau, or clerk under either for the time being, but in the possession of the United States. Hence a party cannot, by writ of replevin against such head of department, or other public officer, take papers from the public archives on allegation of their being his private property.[40]

The fact that in replevin the value of the property may be recovered, in case delivery cannot be had, does not change it to an action in trover, the object being to prevent the action becoming ineffectual by reason of loss or transfer of the property after suit brought; and if it develops that defendant has transferred or lost the property before the suit is begun, then the action fails.[41] Replevin lies only in case of wrongful detention existing at the time suit is commenced.[42] Where defendants obtain possession of a note from plaintiff's husband when they knew he had no title thereto, plaintiff may secure possession of the note without repaying any money they may have paid out in fraudulently securing possession of it.[43]

In replevin against an officer who justifies under attachment against third persons on account of the fraudulent transfer by them to plaintiff, the relation of debtor and creditor must exist between the attachment plaintiff and the fraudulent grantor.[44] If a chattel mortgage provides for the taking possession of the chattels and selling of them on certain conditions, the mortgagee may secure such property by claim and delivery from an officer holding the same under an attachment.[45]

§ 2531. Demand unnecessary.—Where the defendant sets up an adverse claim to the property in replevin, it is unnecessary

39 Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414. See Haugton v. Newberry, 69 N. C. 456; Aber v. Bratton, 60 Mich. 357, 27 N. W. 564; Hall v. White, 106 Mass. 599. But see, also, Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259.

40 Archives of Census Bureau, 6 Op. Atty.-Gen. 7; Brent v. Hagner, 5 Cranch C. C. 71, Fed. Cas. No. 1839.

41 Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355.

42 Redinger v. Jones, 68 Kan. 627, 75 Pac. 997.

43 More v. Finger, 128 Cal. 313, 60 Pac. 933, 58 Pac. 322.

44 Dunn v. Overton, 15 Okla. 670, 83 Pac. 715.

45 First Nat. Bank v. Steers, 9 Idaho, 519, 108 Am. St. Rep. 174, 75 Pac. 225.

to show a demand.[46] The same is true in the case of a claim set up by a pledgee.[47] Where the only issue is as to the alleged wrongful taking, no demand is necessary.[48]

There is a sufficient demand to sustain an action of claim and delivery, the demand being for the purchase money or that the article purchased be delivered up, and the reply being that it could be obtained only by a lawsuit.[49] Nine months is not an unreasonable time to delay a demand for personal property, where there is a reasonable expectation that by delay the matter may be adjusted without suit.[50]

Proof of an antecedent demand is not necessary to maintain replevin, where it appears that a demand would have been unavailing.[51] A demand made after the action is commenced, but prior to execution of the writ, is sufficient, and no demand is necessary if defendant claims ownership and right of possession.[52] Where defendant never conceded the right of plaintiff to the possession of the property, but has denied the claim and right of plaintiff, and has otherwise shown that a demand would be of no avail, proof of the demand and refusal is not necessary.[53]

§ 2532. Persons not entitled to sue.—A tenant in common is not entitled to sue for the common property against his cotenant, nor against one in possession as joint agent of the tenants in common; nor can a subsequent mortgagee sue for the mortgaged property in possession of a prior mortgagee or his agent until after such prior mortgage has been satisfied.[54] Nor can a cotenant maintain replevin against the other tenant for a portion of the crop alleged to have been wrongfully taken from the premises.[55]

46 California Cured Fruit Assoc. v. Stelling, 141 Cal. 713, 75 Pac. 320.

47 Latta v. Tutton, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

48 Woodward v. Edmunds, 20 Utah, 118, 57 Pac. 848; Klug v. Munce, 40 Colo. 276, 90 Pac. 603; Brown v. Lewis, 50 Or. 358, 92 Pac. 1058.

49 Bennett Bros. v. Tam, 24 Mont. 457, 62 Pac. 780.

50 Farrand etc. Organ Co. v. Board etc. M. E. Church, 17 Utah, 469, 18 Utah, 29, 54 Pac. 818.

51 Hennessey v. Barnett, 12 Colo. App. 254, 55 Pac. 197.

52 Denver Live Stock Com. Co. v. Parks, 41 Colo. 164, 91 Pac. 1110; Boswell v. F. N. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

53 Barton v. Mulvane, 59 Kan. 313, 52 Pac. 883.

54 Smith McCord Dry Goods Co. v. Burke, 63 Kan. 740, 66 Pac. 1036.

55 Adams v. Thornton, 1 Cal. App. xviii, 82 Pac. 215.

§ 2533. Persons entitled to sue.—A cotenant of a crop may replevy his share from another cotenant.[56] The wife may sue in claim and delivery for goods taken for the debts of her husband without presenting a third-party claim and affidavit in support thereof.[57] The seller in a conditional sale can maintain replevin, if demand for possession is refused.[58]

A chattel mortgagee, after breach of condition, is entitled to maintain an action of claim and delivery, on an allegation of absolute ownership.[59] Where the controversy is between chattel mortgagees, and the two mortgages were executed at different times, the recitals in one of them does not bind the holder of the other.[60] A chattel mortgagee in actual possession of the property is entitled to replevin it from an officer holding it under a writ of attachment against the mortgagor.[61] A vendee who purchased an undivided interest in a crop in stack can maintain an action of replevin against the attaching creditor of the vendor.[62]

§ 2534. Defenses.—Replevin being in the nature of an action in tort, a set-off of accounts between the parties cannot be settled.[63] Defendant cannot defeat an action for restitution by showing that the property did not belong to the plaintiff; but it must appear that it belonged to the judgment debtor.[64] A seller of goods under a lease reserving title in the seller is entitled to judgment for the recovery of the goods and a forfeiture of the amounts paid on them, though the forfeiture is unconscionable.[65] In a suit by a mortgagee to recover possession of a traction-engine, the mortgagor cannot set up any damages from a late delivery of the engine, when he had given the notes and mortgage after such delivery.[66]

In an action in claim and delivery for property of plaintiff seized by defendant on an alleged lien for rent, defendant cannot

56 Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713.

57 Webster v. Sherman, 33 Mont. 448, 84 Pac. 878.

58 Hydraulic Press Mfrs. v. Whetstone, 63 Kan. 704, 66 Pac. 989.

59 Culver v. Randle, 45 Or. 491, 78 Pac. 394.

60 Judy v. Buck, 72 Kan. 106, 82 Pac. 1104.

61 Beaman v. Interstate Bank, 35 Colo. 573, 85 Pac. 426.

62 Pitman v. Baumstark, 63 Kan. 69, 64 Pac. 968.

63 Freeman v. Trummer, 50 Or. 287, 91 Pac. 1077.

64 Burkhalter v. Nuzum, 9 Kan. App. 885, 61 Pac. 310.

65 Sanford v. Gates, Townsend & Co., 21 Mont. 277, 53 Pac. 749.

66 Frick Co. v. Stephens, 7 Kan. App. 745, 53 Pac. 378.

set up any counterclaim except that for rent.[67] If a widow takes possession of her husband's estate, she acquires by a subsequent appointment as administratrix the title by relation, which can be pleaded as a defense to replevin, provided the taking was lawful.[68] When an officer under an attachment writ seizes property which is in the possession of a third party, he must, on being sued in replevin by such third party for a recovery of the property, show not only a valid writ, but the regularity of the attachment proceedings.[69]

§ 2535. **Defense—Time.**—Replevin brought in 1905 to recover possession of horses which had been in open and undisputed possession of the defendant and his vendor since 1896 is barred by the statute of limitations.[70] It is no defense that defendant has disposed of the property unknown to plaintiff.[71]

§ 2536. **Jurisdiction of the subject-matter.**—A justice of the peace has no jurisdiction in a replevin suit of a crop worth more than five hundred dollars.[72] The law requiring actions for the recovery of property to be commenced in the county in which the property is located includes actions to recover property levied on in attachment.[73] A dwelling-house remaining personalty, but standing by mistake partly on land of another, is subject to replevin by a third party.[74]

The title to an office in a corporation cannot be tried by replevin for the possession of property belonging thereto.[75] An action of replevin to recover chattels levied on by a sheriff as the property of another is not an action against an officer for misconduct in office, and the probate court has jurisdiction of such action where the value of the property does not exceed

67 Osmers v. Furey, 32 Mont. 581, 81 Pac. 345.

68 Casto v. Murray, 47 Or. 57, 81 Pac. 388, 883.

69 Cheeseman v. Fenton, 13 Wyo. 436, 110 Am. St. Rep. 1010, 80 Pac. 823.

70 Leavitt v. Shook, 47 Or. 239, 83 Pac. 391.

71 Andrews v. Hoeslich, 47 Wash. 220, 125 Am. St. Rep. 896, 91 Pac. 772, 18 L. R. A. (N. S.) 1265. But see, contra, Runge v. Wilson, 7 Cal. App. 577, 95 Pac. 178.

72 Robinson v. Bonjour, 16 Colo. App. 458, 66 Pac. 451.

73 Byers v. Ferguson, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5. Contra, Boswell v. F. N. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

74 Page v. Urick, 31 Wash. 601, 96 Am. St. Rep. 924, 72 Pac. 454.

75 Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

one thousand dollars.[76] Claim and delivery will lie for property seized under a writ of attachment when it is stated in the affidavit that such property was exempt.[77]

§ 2537. Jurisdiction of the persons.—The court cannot, in an action for specific personal property, make an order substituting a claimant, on the application of defendant, who has no control of the property.[78] The sureties on a constable's official bond are improperly joined in claim and delivery against the constable for wrongful seizure of property under execution.[79] Replevin for the recovery of an animal impounded by a city marshal, and in his possession, lies against the marshal, and not the city.[80] A buyer of hops under an executory contract, where the hops are to be raised by the seller, is not entitled to replevin for them.[81]

If replevin is properly brought in the county where the property is wrongfully held by defendant's agent, the summons may be issued and served in another county on the agent's principle.[82] Where the justice's court has not obtained jurisdiction, on account of a failure of plaintiff to file a sufficient affidavit, it cannot assess damages for the illegal detention, though defendant was served with summons and appeared.[83]

§ 2538. Jurisdiction of the matter—Time.—In replevin, where the issue is as to the wrongful taking, the cause of action arises in the county where the unlawful taking occurred.[84] A cause of action in replevin in the detinet arises when and where the demand is made and the refusal occurs; and the fact that process may have been served in another county is immaterial, since the question is not where the property was when process was served, but where it was when demand was made for its possession.[85]

§ 2539. Affidavit.—The California statute prescribes as follows: Where a delivery is claimed, an affidavit must be made

76 Walters v. Ratliff, 10 Okla. 262, 61 Pac. 1070.

77 Wagner v. Olson, 3 N. Dak. 69, 54 N. W. 286.

78 State v. District Court, 28 Mont. 445, 72 Pac. 867.

79 Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583.

80 Jenkins v. City of Ontario, 44 Or. 72, 102 Am. St. Rep. 625, 74 Pac. 466.

81 La Vie v. Tooze, 43 Or. 590, 74 Pac. 210.

82 Central Nat. Bank v. Brooke, 71 Kan. 767, 81 Pac. 498.

83 Clendenning v. Guise, 8 Wyo. 91, 55 Pac. 447.

84 Woodward v. Edmunds, 20 Utah, 118, 57 Pac. 848.

85 Nebeker v. Harvey, 21 Utah, 363, 60 Pac. 1029.

by the plaintiff, or by some one in his behalf, showing—1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof; 2. That the property is wrongfully detained by the defendant; 3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief; 4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; 5. The actual value of the property.[86] If the actual value of the property is not correctly stated, the court may disregard the value stated in the affidavit in an action on a replevin bond.[87]

For the purpose of replevying goods which have been attached, the writ of attachment, coupled with proof of the debt, is inadmissible in proof, without introducing the affidavit and other requisites to the issuing of the writ.[88] An action of claim and delivery will lie at the suit of the defendant in attachment to recover the property seized under a writ of attachment, when it is stated in the affidavit that such property was exempt from such seizure.[89] The affidavit prescribed by the statutes is the foundation of the jurisdiction to order an immediate delivery of the property.[90] Such affidavit is no part of the pleadings.[90a]

§ 2540. Sufficient affidavits.—The affidavit of a mortgagee, in a suit to recover the mortgaged chattel, alleging ownership in plaintiff is sufficient;[91] as is also an affidavit stating the aggregate value of the property sought to be replevied, without showing the separate value of each article.[92]

§ 2541. Insufficient affidavits.—Omission to state ownership cannot be cured by amendment; likewise, for not stating that

86 Cal. Code Civ. Proc., § 510; N. Y. Code, § 207. See, also, Alaska Codes, pt. 4, ch. 13, § 124; Ariz. Civ. Code, par. 3812; Idaho Rev. Codes, § 4272; Mont. Rev. Codes, § 6623; Nev. Comp. Laws, § 2195; Or. B. & C. Codes, § 285; Utah Rev. Stats., § 3046; Wash. Bal. Codes, §§ 4119, 5127, 5428; Wyo. Rev. Stats., § 4146.

87 Cal. Code Civ. Proc., § 473.

88 Thornburg v. Hand, 7 Cal. 554.

89 Wagner v. Olson, 3 N. Dak. 69, 54 N. W. 286. As to what property is exempt from execution and who may claim it as such, see Cal. Code Civ. Proc., § 690.

90 Carlon v. Dixon, 12 Or. 144, 6 Pac. 500.

90a Moser v. Jenkins, 5 Or. 447.

91 Bartlett v. Ridgley Nat. Bank, 70 Kan. 126, 78 Pac. 414.

92 Miller v. Graf, 14 Colo. App. 167, 59 Pac. 416. That the affidavit may be made by plaintiff, his agent or attorney, see Miller v. Graf, 14 Colo. App. 167, 59 Pac. 416.

the property is detained from plaintiff.[93] The affidavit may be amended with the permission of the court.[94]

§ 2542. Liability of the sheriff.—If the sheriff takes property belonging to any person other than the defendant he will be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him.[95]

§ 2543. Requisition to sheriff.—The plaintiff or his attorney may thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be to take the same from the defendant.[96]

§ 2544. Bond or undertaking.—Besides the notice and affidavit, an undertaking, by two or more sureties, bound to defendant in a sum double the value of the property, must be furnished the sheriff, whereupon the property described in the affidavit, if found in possession of defendant or his agent, must be taken and held by the sheriff.[97]

A replevin bond made by mistake to the sheriff, instead of to the party to be protected by it, and then corrected, is a valid bond.[98] When the state, or any state officer in his official capacity, or any county, city, or town, is a party, no bond is required of them.[99] The failure to keep the security good and sufficient during the pendency of the action warrants the court in requiring the filing of a new bond.[100]

§ 2545. Dismissal of action before trial.—Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for the return of the property is not affected by

93 Clendenning v. Guise, 8 Wyo. 91, 55 Pac. 447.

94 Bayless v. McFarland, 10 Okla. 747, 63 Pac. 859.

95 Rhodes v. Patterson, 3 Cal. 469. See Taylor v. Rice, 1 N. Dak. 72, 44 N. W. 1017.

96 Cal. Code Civ. Proc., § 511.

97 Cal. Code Civ. Proc., § 512; Alaska Codes, pt. 4, ch. 13, § 126; Ariz. Civ. Code, par. 3814-3816; Idaho Rev. Codes, §§ 4274, 4275; Mont. Rev. Codes, § 6625; Nev. Comp. Laws, §§ 3196, 3197; N. Mex. Comp. Laws, § 2743; Or. B. & C. Codes, § 287; Utah Rev. Stats., § 3048; Wash. Bal. Codes, § 5426; Wyo. Rev. Stats., § 4150.

98 Turner v. Billagram, 2 Cal. 522; Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955.

99 Cal. Code Civ. Proc., § 1058.

100 Greig v. Ware, 25 Colo. 184, 55 Pac. 163.

the fact that before the dismissal an answer had been filed in which no return of the property was claimed.[101] The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle, in an action upon the undertaking, those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant, in an action on the undertaking, is entitled to recover compensation in damages.[102]

§ 2546. Exception by defendant.—The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. If the defendant excepts to the sureties, he cannot reclaim the property.[103]

§ 2547. Justification of the sureties.—When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is waived or until they justify.[104]

§ 2548. Service of the writ.—Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property as stated in the affidavit for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the

101 Mills v. Gleason, 21 Cal. 274.

102 Id. See Tapscott v. Lyon, 103 Cal. 297, 37 Pac. 225; Cederholm v. Loofborrow, 2 Idaho, 191, 9 Pac. 641.

103 Cal. Code Civ. Proc., § 513; N. Y. Code, § 210.

104 Cal. Code Civ. Proc., § 513; N. Y. Code Civ. Proc., § 210.

same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither has any known place of abode, by putting them in the nearest post-office, directed to the defendant.[105]

§ 2549. **Service of writ—Special cases.**—Where the sheriff is defendant, a writ served on the deputy sheriff by the coroner is not an irregular service, nor for his acceptance of the service and giving of a redelivery bond.[106] The action should be deemed to commence when the original summons and order of replevin are issued.[107]

§ 2550. **Property concealed.**—If the property, or any part thereof, be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open and take the property into his possession; and if necessary, he may call to his aid the power of his county.[108]

§ 2551. **Property, how kept.**—When the sheriff has taken property as provided in the code, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same.[109]

§ 2552. **Return of sheriff.**—The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.[110]

§ 2553. **Return of property to defendant.**—If the defendant does not except to the sureties, he may require the return of the property upon giving a written undertaking, executed by two or more sufficient sureties. But if a return of the property be not

105 Cal. Code Civ. Proc., § 512; N. Y. Code, § 209.

106 Nipp v. Bower, 9 Kan. App. 854, 61 Pac. 448.

107 Gilbert v. Stephens, 6 Okla. 673, 55 Pac. 1070.

108 Cal. Code Civ. Proc., § 517; N. Y. Code, § 214.

109 Cal. Code Civ. Proc., § 518; N. Y. Code, § 215.

110 Cal. Code Civ. Proc., § 520; N. Y. Code, § 217.

so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519 of the California Code of Civil Procedure.[111]

§ 2554. Redelivery bond.—Section 514 of the California code contemplates an undertaking given to the sheriff, but it is not invalid if taken in the name of the plaintiff instead of in the name of the sheriff.[112] The bond is assignable by the sheriff.[113]

Execution of a redelivery bond is an appearance in the action and a waiver of any defect in the summons.[114] It also works as an estoppel from denying that defendant was in possession of the goods at the time of the beginning of the action, but not from proof that the title lies in a third party.[115]

§ 2555. Justification of defendant's sureties.—The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant.[116] Where the defendant gives an undertaking to reclaim the property, an affidavit by the sureties annexed is not required by law, and is unnecessary to the validity of the undertaking; it is only a precautionary measure on the part of the sheriff. The right of the defendant to the delivery of the property to him is dependent on the justification upon notice;[117] but in California the affidavit is necessary.[117a] The qualifications of sureties must be such as are prescribed by the Code of Civil Procedure in respect to bail upon an order of arrest.[118] Where the bond is for more than three thousand dollars, more than two sureties may qualify for amounts less than the face of the bond, but in all it must aggregate a sum twice the face of the bond.[119]

111 Cal. Code Civ. Proc., § 514; N. Y. Code, § 211.

112 Slack v. Heath, 4 E. D. Smith, 95, 1 Abb. Pr. 331.

113 Wingate v. Brooks, 3 Cal. 112.

114 Fowler v. Fowler, 15 Okla. 529, 82 Pac. 923.

115 Boyce v. Augusta Camp, M. W. A., 14 Okla. 642, 78 Pac. 322; Nye v. Weiss, 7 Kan. App. 627, 53 Pac. 152.

116 Cal. Code Civ. Proc., § 515.

117 Grant v. Booth, 21 How. Pr. 354.

117a Code Civ. Proc., § 1057.

118 Cal. Code Civ. Proc., § 516; N. Y. Code § 213.

119 Cal. Code Civ. Proc., § 1057, as amended 1907.

§ 2556. Responsibility of the sheriff.—The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff.[120]

§ 2557. Claim by third person.—If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such right or title, and serve the same upon the sheriff, the sheriff is not bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim by an undertaking.[121] Where the property in controversy is in the hands of the plaintiff, and is claimed by a third person, the latter is not obliged to intervene in the pending action, but may institute an original action of claim and delivery.[122]

§ 2558. Affidavit.—Such third person shall make and serve upon the sheriff an affidavit showing his title to the property and his right to the possession. Such provisions are only applicable when the property is taken by the sheriff, in the proper discharge of his duty, from the possession of the defendant or his agent.[123]

§ 2559. Claim under attachment—Lien continues.—T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking as required by section 102 of the Code of Civil Procedure. The undertaking was executed by defendants R. and S. The replevin suit was decided in favor of H. T. obtained judgment in the attachment suit against J. At a later date, an execution in favor of other creditors of J. came into the hands of H., as sheriff, and he levied on the same property, which he sold and paid the proceeds into court. H.

120 Cal. Code Civ. Proc., § 515; N. Y. Code, § 212.

121 Cal. Code Civ. Proc., § 519; N. Y. Code, § 216.

122 Buckley v. Buckley, 9 Nev. 373.

123 King v. Orser, 4 Duer, 431.

then brought this suit against the sureties in the replevin bond. It was held that the lien of T.'s attachment continued after the replevy of the goods by M. J. The possession obtained by the plaintiff in replevin is only temporary; it does not divest the title or discharge the lien. When the same property came into the hands of H., as sheriff, the condition of the replevin-bond to return the property was fulfilled.[124]

§ 2560. Complaint.—Since replevin must be sued out in the county where the property is situated, the complaint in an action in the justice's court must allege the county in which the property is withheld.[125] A petition setting forth the specific facts constituting plaintiff's title as mortgagee is sufficient.[126] If the complaint states a cause of action for conversion, and not replevin, there is no need to have the justice find the value of the goods as in replevin.[127]

If plaintiff seeks to replevy a building, he must state the facts which make it personal property.[128] In an action by a mortgagee to recover mortgaged property, it is proper to allege that the execution creditor had knowledge of the mortgage, since notice to him is binding on the officer, who is merely his agent.[129] A petition based on plaintiff's right under a chattel mortgage does not need to allege that the note is due and unpaid;[130] nor need it allege facts avoiding the effect of a former sale, which appears from the exhibits to the petition.[131]

§ 2561. Complaint—Title and right of plaintiff to possession.—In claim and delivery it is not sufficient to allege ownership and right of possession at some time previous to the beginning of the action; they must be alleged to exist at the time action is begun.[132]

124 Hunt v. Robinson, 11 Cal. 262.

125 Byers v. Ferguson, 41 Or. 77, 65 Pac. 1067, 68 Pac. 5.

126 Thompson v. Caddo County Bank, 15 Okla. 615, 82 Pac. 927.

127 Phillipos v. Mihran, 38 Wash. 402, 80 Pac. 527.

128 Bridges v. Thomas, 8 Okla. 620, 58 Pac. 955.

129 Starr v. Cox, 9 Kan. App. 882, 57 Pac. 247.

130 Swope v. Burnham, 6 Okla. 736, 52 Pac. 924.

131 Samuels v. Burnham, 10 Kan. App. 574, 61 Pac. 755. For other sufficient complaints, see Parkhurst v. Sharp, 10 Kan. App. 575, 61 Pac. 531; More v. Finger, 128 Cal. 313, 60 Pac. 933.

132 Bane v. Peerman, 125 Cal. 220, 57 Pac. 885; Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500; Bingham County Agricul. Assoc. v. Rogers, 7 Idaho, 63, 59 Pac. 931; Simonds v. Wrightman, 36 Or. 120, 58 Pac. 1100; Casto v. Murray, 47 Or. 57,

But the complaint may show plaintiff's right to possession without an express averment to that effect.[133] Failure to allege the right of ownership and possession at the time action is commenced is not cured by any allegations of the answer.[134]

An allegation that plaintiff was entitled to the possession at some prior date without a statement that he is still entitled to the possession, is insufficient, though it is alleged that "defendant still unlawfully withholds and detains" them.[135] If the complaint alleges that on a date named plaintiff was the owner and entitled to the possession of the property, and was in possession, and that the defendant on that day, without plaintiff's consent, and against his will, unlawfully came into possession of the property, and that it was taken from his possession, is a sufficient statement of ownership and right of possession at the commencement of the action.[136]

Plaintiff is not required to make a demand, or to plead facts showing a fraudulent purchase, in recovery from a fraudulent vendee, and his complaint is not open to demurrer because it does not show right of possession in plaintiff.[137] Plaintiff need not anticipate the claim that defendant holds under a valid sale from a fraudulent purchaser.[138] A complaint in replevin by a chattel mortgagee must have a sufficient allegation of plaintiff's special ownership in the goods.[139] A complaint which alleges that plaintiff is the owner of the property by virtue of a chattel mortgage, describing it, and that he is entitled to possession of the property, sufficiently alleges the special ownership and right of possession.[140]

§ 2562. Complaint—Description of the property.—A description of property by giving a list of items, each item containing sev-

81 Pac. 388, 883; Schlitz Brewing Co. v. Grimmon, 28 Nev. 235, 81 Pac. 43; McGregor v. Lang, 32 Mont. 568, 81 Pac. 343; Chan v. Slater, 33 Mont. 155, 82 Pac. 657.

133 Casto v. Murray, 47 Or. 57, 81 Pac. 388, 883.

134 Vanalstine v. Whelan, 135 Cal. 232, 67 Pac. 125; Kimball Co. v. Redfield, 33 Or. 292, 54 Pac. 216.

135 Truman v. Young, 121 Cal. 490, 53 Pac. 1073.

136 Harris v. Smith, 132 Cal. 316, 64 Pac. 409.

137 Payne v. McCormick Harvesting Machine Co., 11 Okla. 318, 66 Pac. 287; Salisbury v. Barton, 63 Kan. 552, 66 Pac. 618.

138 Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029.

139 Elliott v. First Nat. Bank, 30 Colo. 279, 70 Pac. 421.

140 Hoy v. Leonard, 13 Colo. App. 449, 59 Pac. 229.

eral different articles, with the aggregate value of the items, and not of the specific articles, and without an allegation as to where the property is situated, is insufficient.[141] Where property sought to be recovered as personalty had been built into a tramway, the description of it as "steel rails, spikes, bolts," etc., is sufficient, because it can be determined from the description what property is involved.[142] A complaint in replevin describing property as one hundred cords of shingle-bolts and all cedar timber situated on certain real estate gives a sufficient description.[143] The court will award possession of the property brought into court to the one entitled to it, though the description of the property does not correspond with that given in the pleadings.[144]

§ 2563. **Complaint—Allegation of damages.**—Without alleging special damages, the plaintiff may recover in replevin what the use of the property was reasonably worth during its detention.[145]

§ 2564. **Plea or answer.**—In Wyoming, the statute does not give defendant in replevin the right to set up any defense save one going to the question of right of possession of plaintiff at the beginning of the replevin proceedings, and he cannot claim a subsequent conversion on the part of plaintiff.[146] An answer setting up wrongdoing by the plaintiff after the action is brought is no defense.[147] A mere clause in the prayer for relief in defendant's answer, asking for damages, is insufficient.[148]

A general denial in replevin is not subject to a general demurrer.[149] Under a general denial, defendant may show any defense which will defeat plaintiff's claim of right of possession; may show possession taken in investing a lien for unpaid rent; may show that the chattel mortgage under which plaintiff claims was obtained by fraud.[150] The general denial closes the issues and entitles defendant to prove every fact showing that plaintiff can-

141 Hawley v. Kocher, 123 Cal. 77, 55 Pac. 696.

142 Alberson v. Elk Creek Gold Min. Co., 39 Or. 552, 65 Pac. 978.

143 Casey v. Malidore, 19 Wash. 279, 53 Pac. 60.

144 Citizens' Nat. Bank v. Larabee, 64 Kan. 158, 67 Pac. 546.

145 Farrand etc. Organ Co. v. Board etc. M. E. Church, 17 Utah, 469, 18 Utah, 29, 54 Pac. 818.

146 Schlessinger v. Cook, 9 Wyo. 256, 62 Pac. 152.

147 Bartlett v. Ridgley Nat. Bank, 70 Kan. 126, 78 Pac. 414.

148 Shafer v. Russell, 28 Utah, 444, 79 Pac. 559.

149 Gila Valley etc. R. R. Co. v. Gila County, 8 Ariz. 292, 71 Pac. 913.

150 Payne v. McCormick Harvesting Machine Co., 11 Okla. 318, 66 Pac. 287.

not maintain an action, and the issues cannot be enlarged by further allegations.[151] Under the general denial it may be shown that the sale to the plaintiff is void for non-delivery;[152] that the title lies in the defendant himself.[153]

The sufficiency of a demand by a pledgor for the return of the pledged goods is admitted by the pledgee's failure to deny it in his answer.[154] An answer disclaiming any right, title, or interest in the property in controversy presents no issue upon the allegations of the petition, since the question is not the title to the property, but its wrongful detention.[155] Where plaintiff claims under a chattel mortgage, a denial that any chattel mortgage was executed by the owner is not a denial of the mortgage in question.[156]

§ 2565. **Reply—Cross-complaint.**—Under a denial of right of possession in a cross-complaint in claim and delivery, the persons denying may show right of possession in themselves under a chattel mortgage.[157] Where the reply alleges right of possession under a chattel mortgage, defendant cannot object to plaintiff's proof of special property because he has no opportunity to challenge the validity of the mortgage; for the statutes[157a] provide that allegations of new matter in the reply shall be deemed controverted as on a direct denial.[158] Plaintiff may have an improper counterclaim stricken from the answer on motion.[159]

§ 2566. **Amended pleadings.**—Defendant is entitled to have the complaint amended by setting forth the itemized value of each article sought to be replevied.[160] It is proper to permit the amendment of the complaint so as to make it allege a special instead of an absolute ownership.[161] Where it is shown that de-

151 Street v. Morgan, 64 Kan. 85, 67 Pac. 448.

152 Israel v. Day, 17 Colo. App. 200, 68 Pac. 122.

153 Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725.

154 Latta v. Tutton, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

155 Zeisler v. Bingman, 9 Kan. App. 447, 60 Pac. 657.

156 Sargent v. Chapman, 12 Colo. App. 529, 56 Pac. 194.

157 Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

157a Hill's Annot. Laws, § 94; B. & C. Codes, § 97.

158 Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319.

159 Osmers v. Furey, 32 Mont. 581, 81 Pac. 345.

160 Hall v. Law Guarantee etc. Co., 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643.

161 Swope v. Burnham, 6 Okla. 736, 52 Pac. 924.

fendant wrongfully disposed of the property before the commencement of the action, it is not an abuse of discretion, after the evidence is closed, to permit an amendment so as to support a recovery for the conversion of the property, where it is not shown that plaintiff knew, when the action was brought, that defendant no longer had possession of the property.[162] It is not error to permit plaintiff to amend his petition as to the value alleged in the replevin affidavit or petition.[163] An amendment which sets up facts provable under the original specific denial, is demurrable.[164]

§ 2567. Issues and proof.—In claim and delivery, the main issue is right to possession.[165] The right of possession is not *res adjudicata*, unless that question is tried and passed upon with such certainty as to remove all doubt and uncertainty.[166] A nonsuit is properly granted where plaintiff only proves title, and it appears that the property had rightfully come into the possession of defendant, no wrongful detention being proven.[167]

An allegation of ownership in replevin may be supported by proof of special ownership;[168] as where plaintiff is a mortgagee in possession.[169] Where plaintiff alleges that she has been deprived of a note by the conspiracy of defendants, the conspiracy is immaterial to her recovery, and need not be proven.[170] Where the complaint contains general allegations of title and right of possession, without setting forth the origin of them, any evidence, such as proof of fraud, tending to rebut plaintiff's claim may be admitted under a general denial.[171]

Where defendant does not deny by affidavit the execution of the note and mortgage set out in the complaint, it is not necessary for plaintiff to prove their execution, and that they are unpaid.[172] Where defendant denies that he was the owner since a certain

162 Henderson v. Hart, 122 Cal. 332, 54 Pac. 1110.

163 Chandler v. Parker, 65 Kan. 860, 70 Pac. 368; McManus v. Walters, 62 Kan. 128, 61 Pac. 686.

164 Idaho Placer Min. Co. v. Green, 14 Idaho, 249, 93 Pac. 954.

165 Cunningham v. Stoner, 10 Idaho, 549, 79 Pac. 228.

166 Geiser Mfg. Co. v. Berry, 12 Okla. 183, 70 Pac. 202.

167 Dodd & Co. v. Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

168 Crocker v. Burns, 13 Colo. App. 54, 56 Pac. 199.

169 Falk v. Decou, 8 Kan. App. 765, 61 Pac. 760.

170 More v. Finger, 128 Cal. 313, 60 Pac. 933.

171 Gallick v. Bordeaux, 22 Mont. 470, 56 Pac. 961.

172 Hardwick v. Atkinson, 8 Okla. 608, 58 Pac. 747.

date, it is an admission that he was owner of it prior to that date, on the ground that every material allegation of the complaint not specifically denied by the answer shall, for the purpose of the action, be taken as true.[173]

§ 2568. Burden of proof.—In replevin, the burden of proof is on the plaintiff to establish his claim by a preponderance of evidence;[174] and this burden is not shifted to defendant by his admission of title in plaintiff and a claim of special property in himself.[175] In claim and delivery for property held under an alleged lien for rent, plaintiff in her case in chief must prove ownership and the taking and detention by defendant against her consent, the burden of justification being on the defendant.[176]

In wrongful seizure under execution, the proof rests upon plaintiff to show ownership by virtue of a valid sale from the execution debtor, and proof of notice of the claim does not shift this burden.[177] In a replevin suit for a piano, for failure to make payments thereon, the defendant's plea of payment did not throw the burden of proof on the defendant, as the plaintiff must establish his ownership of the property.[178] Where plaintiff's claim is based on his purchase of the goods and delivery to defendant, a charge is erroneous which places on defendant the burden of showing that he purchased the goods.[179] Where a mortgagee, claiming under the mortgage of a certain number of sacks of flour, part of which is to be made up from wheat on hand, seeks to replevin flour sold by the owner to defendant, the burden of proof is on defendant to show that the flour he obtained was not part of that covered by mortgage.[180]

§ 2569. Admissibility of evidence.—In replevin, admission of evidence of harsh measures taken by one of the parties to obtain possession of the property is prejudicial error, but evidence of an assignment of a note and mortgage is admissible where plain-

173 Dillery v. Borwick, 36 Or. 255, 59 Pac. 183.

174 Kerfoot v. State Bank of Waterloo, 14 Okla. 104, 77 Pac. 46; Haveron v. Anderson, 3 N. Dak. 540, 58 N. W. 340.

175 Dodd & Co. v. Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352.

176 Osmers v. Furey, 32 Mont. 581, 81 Pac. 345.

177 Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583.

178 Johnston v. McCart, 24 Wash. 19, 63 Pac. 1121.

179 Butler v. Estrella Raisin Vineyard Co., 124 Cal. 239, 56 Pac. 1040.

180 Falk v. Decou, 8 Kan. App. 765, 61 Pac. 760.

tiff claims under that assignment.[181] A refusal of proof of an agreement for settlement of the claim in controversy is proper where no action was taken on such agreement, and there was no consideration.[182] Evidence that a subsequent purchaser had actual notice, when it acquired possession of the property, that plaintiff had a mortgage on such property is admissible.[183]

A defendant in replevin, who executes a redelivery bond, is estopped from denying that he was in possession of the property at the time the action was begun, but not from proof of title in a third party.[184] Under a general denial, defendant can show that a sale under which plaintiff claims the property seized under execution is a void sale.[185] Where plaintiff claims chattels under a bill of sale, defendant's admission of execution of the bill of sale does not preclude him from attacking it on the grounds that it was fraudulently intended as a mortgage and was improperly executed.[186]

Where the property was seized by defendant under an alleged lien for rents, evidence of the cost price of the furniture is admissible as tending to prove value thereof; and any counterclaim of defendant not arising out of the transaction set forth in the complaint nor connected with the subject of the action should not be admitted.[187] Where it is not evident that the creditors dealt with defendant on the strength of his possession of certain property, it is immaterial that he held out to them that the property was his when it belonged to his wife.[188]

§ 2570. Weight and sufficiency of evidence.—A plaintiff in replevin may be entitled to judgment, though the evidence is merely sufficient to show that the property was taken from his possession.[189] The charge that plaintiff must establish her title to the property by a "clear" preponderance of the evidence is technically erroneous.[190] A bill of sale claimed to have been

181 Flinn v. Ferry, 127 Cal. 648, 60 Pac. 434.

182 Miller v. Graf, 14 Colo. App. 167, 59 Pac. 416.

183 Strahorn-Hutton Evans Com. Co. v. Florer, 7 Okla. 499, 54 Pac. 710.

184 Boyce v. Augusta Camp, M. W. A., 14 Okla. 642, 78 Pac. 322.

185 Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583.

186 Culver v. Randle, 45 Or. 491, 78 Pac. 394.

187 Osmer v. Furey, 32 Mont. 581, 81 Pac. 345.

188 Webster v. Sherman, 33 Mont. 448, 84 Pac. 878.

189 Cheeseman v. Fenton, 13 Wyo. 436, 110 Am. St. Rep. 1010, 80 Pac. 823.

190 Chan v. Slater, 33 Mont. 155, 82 Pac. 657.

made to a prior owner, under whom defendant claimed, is admissible without proof of its genuineness.[191] Evidence put forth by plaintiff that the certain skins were goat-skins, and came from the island from which defendant is charged with having obtained them, throws the burden upon defendant to show where the skins were obtained.[192]

Where plaintiff in replevin, relying on a chattel mortgage, testified, without objection, that he held the property under such mortgage, and was in actual possession of it until a certain note was paid, the complaint was supported by competent evidence, though the note and mortgage were not introduced.[193]

§ 2571. Damages, measure of.—In actions of replevin, where delivery cannot be had, and only detention of property is complained of, the measure of damages in respect to the value of property detained is the value of the property at the place of detention when the action was commenced. In such case the action bears a near resemblance to trover, in which the value of the property at the place of conversion is taken as the criterion.[194] The highest market value of the property between the time of conversion and the time of trial may be shown.[195] For the purpose of determining the value of the property at the place of detention, and where, also, delivery should have been made, evidence is admissible of its value at the place of market, the cost of transportation thither, and the usual expenses of sale.[196] In an action to recover the materials which before their removal composed a structure which was a part of the realty, the measure of damages is the value of the materials after their removal.[197]

The right of a bailee as against one who, without title or right of possession, replevied the property from him, is not limited to a recovery of the value of his special interest, a return of the property being impossible; but he may recover its full value,

191 Leavitt v. Shook, 47 Or. 239, 83 Pac. 391.

192 Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

193 Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319. For sufficient evidence of plaintiff's ownership, see Alper v. Tormey, 3 Cal. App. 396, 85 Pac. 661; Shine v. Culver, 42 Wash. 484, 85 Pac. 271; More v. Finger (Cal.), 58 Pac. 322; Moran v. Lennon, 127 Cal. xviii, 59 Pac. 941; Oyler v. Dautoff, 36 Or. 357, 59 Pac. 474.

194 Hisler v. Carr, 34 Cal. 641.

195 Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

196 Hisler v. Carr, 34 Cal. 641.

197 Pennybecker v. McDougal, 48 Cal. 160.

holding the excess in trust for his bailor.[198] So a sheriff may recover the full value of property taken from him, when he rightfully held it under execution.[199] Evidence by defendant, in an action of replevin, that he lost much time, and had been deprived of the replevied goods, and had been delayed in the payment of his debts, is not sufficient to show the damages resulting from the wrongful suing out of the writ.[200]

§ 2572. Damages—Detention of property.—The measure of damages may be fixed by the court.[201] Sections 438 and 442 of the California Code of Civil Procedure do not authorize a counterclaim for trespass and injury to a crop by plaintiff's cattle, in an action of claim and delivery to recover the cattle.[202] The usual value is the measure of damage, in replevin for a cow.[203] The amount plaintiff can recover, in case a redelivery cannot be had, is the market value of the property when the taking occurred or the wrongful detention began.[204]

In an action to recover personal property wrongfully seized, or the value thereof, plaintiff is not limited to the price for which defendant may have sold the same.[205] Where defendant finally recovered possession of certain sheep and their increase, and the wool shorn by plaintiff from the sheep, plaintiff is entitled to the cost of shearing the sheep and marketing the wool.[206]

In an action to recover possession, plaintiff may recover damages for the detention of the property.[207] Where the owner of a cow places it in a pasture, without making any agreement for its hire or use, and then leaves the state for a time, when he comes back and replevies the cow he cannot have damages for her use, prior to a demand for her possession, since it does not appear that the cow would have been of any use to him during that time.[208]

198 Hall v. Southern Pacific Co., 6 Ariz. 378, 57 Pac. 617.

199 Coos Bay P. & E. R. Co. v. Siglin, 34 Or. 80, 53 Pac. 504.

200 Hays v. Windsor, 130 Cal. 230, 62 Pac. 395.

201 State Bank of Stockton v. Showers, 65 Kan. 431, 70 Pac. 332.

202 Glide v. Kayser, 142 Cal. 419, 76 Pac. 50.

203 Smith v. Stevens, 33 Colo. 427, 81 Pac. 35.

204 Osmers v. Furey, 32 Mont. 581, 81 Pac. 345.

205 Cowden v. Finney, 9 Idaho, 619, 75 Pac. 765.

206 Cunningham v. Stoner, 10 Idaho, 549, 79 Pac. 228.

207 Hickey v. Coschina, 133 Cal. 81, 65 Pac. 313.

208 Smith v. Stevens, 14 Colo. App. 491, 60 Pac. 580.

§ 2573. Damages—Allowance of interest.—A defendant in replevin, though found to be entitled to a redelivery of the property or its value at the time of the trial, is not entitled to interest, but he may have damages for its depreciation in value.[209] The measure of damages is the same as for conversion, as prescribed in section 4333 of the Civil Code of Montana; so that where evidence as to value relates only to the time of wrongful taking, interest only can be had.[210] It is error to award the plaintiff interest on the value, in addition to damages in a gross sum.[211]

The measure of damages for detention of stock is the legal interest on the value thereof from the time of the taking until the trial, and not the value of the use during such time.[212] Under section 667 of the California Code of Civil Procedure, providing that judgment in replevin may be had for possession of the goods, or for their value, with damages for their detention, interest on the value of replevied property from the time of the taking is allowable only as damages for its detention, so that both interest and damages cannot be allowed for such detention.[213]

§ 2574. Damages—Costs and expenses.—A seller entitled to judgment in replevin for the return of goods sold is required to repay freight charges for transportation of same to the place of delivery.[214] Plaintiff is not entitled to damages because of money spent for attorney's fees;[215] nor is the defendant entitled to any attorney's fees.[216]

§ 2575. Trial of issues.—It is proper to refuse defendant's motion to reopen a replevin suit in which the complaint was amended at the close of the evidence so as to support a recovery for conversion, if defendant fails to show that there is any new evidence.[217] Where defendant claims to hold the property under an order of attachment and there is nothing to show the possession of defendant to be legal, it is proper for the court to instruct

209 La Vie v. Crosby, 43 Or. 612, 74 Pac. 220.

210 Webster v. Sherman, 33 Mont. 448, 84 Pac. 878.

211 Freeborn v. Norcross, 49 Cal. 313.

212 Austin v. Terry, 13 Colo. App. 141, 56 Pac. 810.

213 Garcia v. Gunn, 119 Cal. 315, 51 Pac. 684.

214 Kulzer v. Simonton, 41 Wash. 587, 84 Pac. 582.

215 Harris v. Smith, 132 Cal. 316, 64 Pac. 409; Hays v. Windsor, 130 Cal. 230, 62 Pac. 395.

216 Black v. Hilliker, 130 Cal. 190, 62 Pac. 481.

217 Henderson v. Hart, 122 Cal. 332, 54 Pac 1110.

for the plaintiff.[218] Where it is not evident that the plaintiff's claim had not been satisfied out of other property, and that the defendant had possession under a first mortgage, with the consent of the mortgagor, a peremptory instruction should be made for the defendant.[219]

§ 2576. **Instructions to the jury.**—An instruction not based on any issue in the case is erroneous.[220] In replevin against an officer, an instruction is misleading if it does not make a distinction between a sale to plaintiff, good as against the debtor, and a sale valid as against the creditors of the latter.[221] In a suit for recovery of hops, an instruction that if defendant is entitled to recovery he is entitled to the highest market price between the time of the taking and the time of trial is harmless error.[222] An instruction to find for the defendant unless the sale under which plaintiff claimed was followed by actual change of possession was improper for not requiring the change of possession to be both actual and continuous.[223] In replevin of a machine by the vendor, whether the vendee had elected to affirm or disaffirm is a question for the jury.[224] An instruction as to the effect of the mingling of a married woman's property with that of her husband is properly refused where there is no proof of such mingling.[225] As, also, is an instruction as to the effect of a removal of the property from the state, there being no evidence of such removal.[226] An instruction that if any person other than plaintiff has, or had at the time of the alleged taking, any interest in the property in question, the jury must find for defendant, is error, since the sole issue is the right of plaintiff to possession.[227]

§ 2577. **Verdict and findings.**—In claim and delivery, where each party claims the right of possession by virtue of absolute ownership, and in no other manner, a verdict which finds the plaintiff entitled to the possession of the property, and fixes its

218 Goodwin v. Sutheimer, 8 Kan. App. 212, 55 Pac. 486.

219 Parkhurst v. Sharp, 10 Kan. App. 575, 61 Pac. 531.

220 Gray v. Sharpe, 17 Colo. App. 139, 67 Pac. 351.

221 Israel v. Day, 17 Colo. App. 200, 68 Pac. 122.

222 La Vie v. Crosby, 43 Or. 612, 74 Pac. 220.

223 Gallick v. Bordeaux, 31 Mont. 328, 78 Pac. 583.

224 Cincinnati Punch etc. Co. v. Thompson, 72 Kan. 432, 83 Pac. 988.

225 Webster v. Sherman, 33 Mont. 448, 84 Pac. 878.

226 Lowe v. Donnelly, 36 Colo. 292, 85 Pac. 318.

227 Lillie v. Shaw, 22 Wash. 234, 60 Pac. 406.

value, will support a judgment for the plaintiff for possession of the property, or its value as found by the jury.[228] The verdict for plaintiff need not expressly find that he was the owner or entitled to possession of the property.[229] Where plaintiff alleged that he was the owner and entitled to possession, a verdict that plaintiff is entitled to possession is insufficient, because not finding the ownership.[230] The value may be found to be an amount between the figures set by witnesses.[231]

A general verdict in replevin, mentioning one of the two defendants, is sufficiently definite in favor of the defendant not mentioned.[232] Where plaintiff gave bond and took the property and sold it, and defendant, without asking or demanding its return, obtained a verdict in his favor, the court cannot assess the value of the property.[233] If the trial court finds for defendant, plaintiff cannot retain chosen articles on payment of their value to the defendant.[234] A finding that plaintiff acquired no title, and that it belonged to and was in the possession of the defendant in the writ, is sufficient to support judgment against plaintiff, without an express finding that he was not entitled to possession.[235] If defendant pleads payment and usury, a verdict that the chattels are the property of defendant, and that he is entitled to the possession of them, is equal to a general verdict on the issues of usury and payment.[236] A complaint alleging wrongful taking is supported by a verdict for wrongful detention, when no objection was made to the complaint by special plea.[237]

§ 2578. Judgment.—A court has no jurisdiction to order the return of replevied property which was never actually taken into the possession of the sheriff.[238] Where it is provided by statute that judgment for the plaintiff may be for the possession or value of the property, in case a delivery cannot be had, and

228 Branstetter v. Morgan, 3 N. Dak. 290, 55 N. W. 758.

229 McGregor v. Lang, 32 Mont. 568, 81 Pac. 343.

230 Feller v. Feller, 40 Or. 73, 66 Pac. 468.

231 Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500.

232 Lawson v. Robinson, 68 Kan. 737, 75 Pac. 1012.

233 Levy v. Leatherwood, 5 Ariz. 244, 52 Pac. 359.

234 Black v. Hilliker, 130 Cal. 190, 62 Pac. 481.

235 Banning v. Marleau, 133 Cal. 485, 65 Pac. 964.

236 Nunn v. Bird, 36 Or. 515, 59 Pac. 808.

237 Nebeker v. Harvey, 21 Utah, 363, 60 Pac. 1029.

238 Gallup v. Wortman, 11 Colo. App. 308, 53 Pac. 247.

damages for the detention, a plain money judgment in replevin for the value of the property as assessed by the jury is improper.[239] A finding that the defendant was entitled to the possession of the stock, under a lease, at the time of the beginning of the suit, but not at the close of the suit, does not support a judgment for the return of the property or the value thereof.[240] A description of the property is sufficiently plain if defendant can identify and return it.[241] The verdict in replevin need not be in the alternative, and the trial court has the right to so render it after appeal.[242]

Where plaintiff claims by virtue of a chattel mortgage, and defendant by virtue of an attachment, the defendant's interest is a special one, and is measured by the amount of his lien, and in no case can an alternative judgment be had for an amount exceeding the lien.[243] Where the verdict assesses the value of the property at a sum greater than that alleged in the petition, and no amendment is made or asked, the judgment should be for only the sum stated in the petition. If the title or right should change during the pendency of the action, the judgment should adjust the equities at the time the judgment is rendered.[244]

§ 2579. **Effect of the judgment.**—A judgment for the value of property replevied is not a judgment for damages, authorizing the jury to assess the value of the property taken and damages for its detention.[245] A judgment in replevin to recover chattel securities is *res adjudicata* in any further action to enforce the notes.[246]

A default judgment against a defendant husband, answering jointly with his wife in replevin, for community property, is not final and binding on the wife.[247] The judgment must be for the

239 Hall v. Law Guaranty etc. Co., 22 Wash. 305, 79 Am. St. Rep. 935, 60 Pac. 643.

240 Legere v. Stewart, 17 Colo. App. 472, 68 Pac. 1059. For a statement of a proper judgment, where the parties are joint owners and entitled to joint possession, see Kehoe v. McConaghy, 29 Wash. 175, 69 Pac. 742.

241 McGregor v. Lang, 32 Mont. 568, 81 Pac. 343.

242 Hynes v. Barnes, 30 Mont. 25, 75 Pac. 523; Ereca v. Meyer, 142 Cal. 308, 75 Pac. 826.

243 Nichols & Shepard Co. v. Bishop, 12 Okla. 250, 70 Pac. 188.

244 Brook v. Bayless, 6 Okla. 568, 52 Pac. 738.

245 Hall v. Southern Pacific Co., 6 Ariz. 378, 57 Pac. 617.

246 Nichols & Shepard Co. v. Trower, 14 Okla. 461, 78 Pac. 575.

247 Glass v. Buttner, 39 Wash. 296, 81 Pac. 699.

full value of the property, and need not specify the value of each article.[248] The right of defendant in replevin to judgment in the alternative is not an exclusive remedy; for he may maintain separate action to accomplish the same results.[249] Where defendant proves title to the property, she is entitled to judgment for its return, or its value, though she did not pray for affirmative relief in her answer;[250] but an alternative judgment is unnecessary, if the successful party has the possession, or where a return is impossible.[251]

§ 2580. **Satisfaction of the judgment.**—In case of judgment for the plaintiff, it is the duty of the defendant to tender possession of the replevied property, and of plaintiff to demand it before the enforcement of a money judgment.[252] An offer of defendant to return the property before a levy of execution is a satisfaction of the judgment, and thereafter no proceedings can be legally had to enforce by execution the alternative judgment for money.[253] Tender by the plaintiff in replevin of the articles adjudged to be returned should be to the holder of the judgment, though another is beneficially interested; and he should seek such person at his place of business, and there tender it in the same condition as when received, to avoid liability on his bond.[254] When the property is in the hands of a custodian, it may be delivered by a mere agreement, and it is then subject to seizure on claim against the plaintiff who received it.[255] Judgment cannot be satisfied *pro tanto*, by a partial delivery of the animals in a diseased condition.[256]

§ 2581. **Judgment enforced.**—The delivery of property replevied, after judgment for the defendant partnership, to one of the partners, though contrary to the instructions of the other partner, is a satisfaction of the judgment.[257] In order to comply

248 Jones v. Messenger, 40 Colo. 37, 90 Pac. 64.

249 Johnson v. Boehme, 66 Kan. 72, 97 Am. St. Rep. 357, 71 Pac. 243.

250 Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725.

251 Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

252 McRae v. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94.

253 Johnson v. Gallegos, 10 N. Mex. 1, 60 Pac. 71; Marks v. Willis, 36 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526.

254 Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454.

255 High v. Emerson, 23 Wash. 103, 62 Pac. 455.

256 Jones v. Messenger, 40 Colo. 37, 90 Pac. 64.

257 Leve v. Frazier, 42 Or. 141, 70 Pac. 376.

with an alternative judgment, the property must be returned in substantially the same condition and without deterioration in value; and if not so returned, action may be had for the depreciation.[258] Where an alternative judgment in an action of replevin is rendered, the return of an execution unsatisfied, because of the officer's inability to get the goods, does not justify the issuance of an *alias* execution for enforcing only the alternative money judgment, since its return unsatisfied does not change the form of the judgment, and an execution must follow the judgment.[259]

§ 2582. Appeal and error.—A buyer of cattle under a warranty of title, when sued in replevin for the cattle, is entitled to an appeal to reverse judgment rendered for the plaintiff.[260] Where defendant in replevin had property taken from him under a writ, he was not debarred by such seizure from appealing from an adverse judgment in a replevin suit.[261] Where in an appeal the plaintiff files a bill of particulars describing each article and alleging its value, the fact that the replevin affidavit failed to state such values is immaterial.[262] Where plaintiff elects to take the money judgment, the supreme court may render judgment for the amount of the judgment in the lower court, with costs against defendant and his sureties on the appeal-bond.[263] The failure of the verdict in favor of plaintiff to state the value of the property is not prejudicial to defendant.[264]

A judgment for the plaintiff in an action for the recovery of personal property is immediately enforceable, unless the defendant gives a stay-bond, and the fact that the defendant has given a bond for redelivery does not entitle him to an order of the appellate court staying proceedings on the judgment appealed from.[265]

§ 2583. Liability on bonds and undertakings.—In an action on a replevin bond, the defendant's liability is limited to the damages sustained by a failure to return the property.[266] The

258 Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847.

259 Marks v. Willis, 36 Or. 1, 78 Am. St. Rep. 752, 58 Pac. 526.

260 Dendy v. First Nat. Bank, 67 Kan. 856, 71 Pac. 830, 74 Pac. 268.

261 Culver v. Randle, 45 Or. 491, 78 Pac. 394.

262 Boyce v. Augusta Camp, M. W. A., 14 Okla. 642, 78 Pac. 322.

263 Billups v. Freeman, 5 Ariz. 268, 52 Pac. 367.

264 Bank of Akron v. Dole, 25 Colo. 1, 52 Pac. 673.

265 Swasey v. Adair, 88 Cal. 203, 26 Pac. 83.

266 Hunt v. Robinson, 11 Cal. 262.

sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. And this liability cannot be more than the value of the property fixed by the judgment in the original suit. It is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given.[267] It must also be alleged that the defendant neither redelivered the property nor paid the value thereof, as recited in the judgment, and the judgment in the replevin suit must be in the alternative.[268]

Where a justice of the peace has no jurisdiction to render a judgment in the case, an action will not lie for breach of the replevin bond given in such suit.[269] If the undertaking in an action commenced in a justice's court limits the liability of the obligors to a judgment for a return of the property rendered by the justice, and such judgment is not recovered before the justice, no recovery can be had on the undertaking, even though judgment for the return of the property be rendered by the county court on appeal. It is otherwise where the undertaking is in statutory form. Nor are the sureties liable to defendant, unless he recovers judgment for a return of the property.[270]

The obligation of the bond in claim and delivery, which provides for the prosecution of the action and a return of the property if so adjudged, is broken by a failure of plaintiff to prosecute the action;[271] but "duly prosecute" does not mean to "successfully prosecute."[272] Where no summons was issued until after possession of the property was obtained, when plaintiff dismissed the suit, plaintiff is estopped from denying that an action was pending when suit is brought on the bond.[273] Where plaintiff dismisses the suit after a return of the property, attorney's fees and expenses cannot be recovered.[274]

If in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may

267 Nickerson v. Chatterton, 7 Cal. 568. For other sufficient complaints, see Parrott v. Scott, 6 Mont. 340, 12 Pac. 763; Hedderick v. Pontet, 6 Mont. 345, 12 Pac. 765.

268 Nickerson v. Chatterton, 7 Cal. 568.

269 Robinson v. Bonjour, 16 Colo. App. 458, 66 Pac. 451.

270 Mitchum v. Stanton, 49 Cal. 302.

271 Keenan v. Washington Liquor Co., 8 Idaho, 383, 69 Pac. 112.

272 Citizens' State Bank v. Morse, 60 Kan. 526, 57 Pac. 115.

273 Central Nat. Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895.

274 Edwards v. Bricker, 66 Kan. 241, 71 Pac. 587.

sustain by reason of any costs, suits, judgments, and executions that shall come or be brought against him, the sheriff cannot maintain an action on the bond because of a judgment recovered against him, but must first pay the judgment.[275] It is no defense to an action on a replevin-bond that it is signed by one surety only, while the statute authorizes plaintiff in replevin to secure possession of the property on a bond executed by two or more sureties.[276] Failure of the sureties to justify on notice exonerates them from any further liability.[277]

§ 2584. Extent of liability on the bond.—The Colorado code expressly limits the power of the court, in rendering judgments for a return of property and damages for its detention, to cases where such return and damages are asked for in defendant's answer; and unless they are so pleaded, any such judgment is void as against the sureties on the bond.[278] Defendant is bound by the recital in the bond as to the value of the property also recited in the complaint and judgment for return of the property,[279] even though the case be dismissed, because the value of the property exceeded three hundred dollars—the jurisdiction of the justice's court.[280] Where no judgment was rendered against defendant for damages, and he immediately returned the property, an action on the bond cannot be commenced to secure damages for depreciation in value of the property.[281] Where, in an action of claim and delivery, a judgment was rendered in favor of defendant, it is error to enter judgment against the surety on the claim-bond.[282]

§ 2585. Suit on the bond—Parties.—Plaintiffs in replevin may sue in their own names on a forthcoming bond executed for their exclusive benefit which has been assigned to them by the sheriff, the nominal obligee.[283] Where attorneys who defendant claims

275 Lott v. Mitchell, 32 Cal. 23.

276 Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454. See, also, Ward v. Whitney, 8 N. Y. 446; Sieff v. Shausenburgh, 10 Abb. Pr. 477, note.

277 Rinear v. Skinner, 20 Wash. 541, 56 Pac. 24.

278 Gallup v. Wortmann, 11 Colo. App. 308, 53 Pac. 247.

279 Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454.

280 Janssen v. Duncan, 43 Colo. 286, 95 Pac. 922.

281 Lewis v. McNary, 38 Or. 116, 62 Pac. 897.

282 Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111.

283 Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955.

have a lien on the judgment have not taken any steps to enforce the lien, they are not necessary parties to an action against defendants as sureties on the replevin bond.[284]

§ 2586. Suit on the bond—Pleadings and evidence.—Where sureties on a forthcoming bond given by defendant in replevin set up the defense that they have been discharged by reason of an agreement between plaintiff and defendant, by which the proceedings in the replevin were postponed without their consent, it is not sufficient for them to aver that the agreement was valid, but the facts showing its validity must be disclosed.[285] It is not necessary for the petition to allege that an affidavit was filed in the replevin action prior to the issuance of the order of delivery, but that the judgment was rendered must be set forth. Nor is it necessary to state that the property was returned on the bond, when the bond contains that statement, and is made a part of the petition.[286] In an action against the sureties the burden is upon the plaintiff to show a breach of the bond by the principal.[287]

FORMS IN CLAIM AND DELIVERY.

§ 2587. Affidavit on claim and delivery of personal property.

Form No. 704.

[TITLE.]

STATE OF CALIFORNIA, }
. . . COUNTY OF . . . } ss.

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. I am the owner of, and am lawfully entitled to the possession of, the following-described personal property, to-wit: [Describe property.]

III. That the said property is in the possession of, and is wrongfully detained by, the defendant in the said action.

IV. That the alleged cause of the detention of the said property, according to my knowledge, information, and belief, is the following, to-wit: [Or, if he knows cause of detention from personal knowledge, allege it.]

284 Eisenhart v. McGarry, 15 Colo. App. 1, 61 Pac. 56.

285 Smith v. Stubbs, 16 Colo. App. 130, 63 Pac. 955.

286 O'Loughlin v. Carr, 9 Kan. App. 818, 60 Pac. 478.

287 Gallup v. Wortmann, 11 Colo. App. 308, 53 Pac. 247.

V. That neither the said property, nor any part thereof, has been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against my property [or, that said property was seized and is held under an execution [or, attachment] against my property, but that the same is exempt by law from such seizure, alleging exemption as in form No. 706], and that the actual value of the said property is . . . dollars.

[JURAT.] [SIGNATURE.]

§ 2588. Another form.

Form No. 705.

[TITLE.]

[VENUE.]

A. B., of . . . , being duly sworn, deposes and says as follows:

I. I am the owner and am entitled to the immediate possession of the following-described property: [Describe same.]

[Or, I. The following goods . . . were stored with me by their owner for . . . months, which storage is worth . . . dollars; and they have been taken from me without my consent, and without payment of said storage; or other facts, showing right to the possession, avoiding legal conclusions.]

II. That said property is wrongfully detained by C. D., at . . .

III. The alleged cause of such detention, according to my best knowledge, information, and belief, is [state it particularly]. [Or, I have no knowledge, or information, or belief of any cause alleged for such detention.]

IV. The said property has not been taken for a tax, assessment, or fine, pursuant to any statute.

V. It has not been seized under any execution or attachment against my property. [Or, if so seized, show exemption as below.]

[Or, V. That it was seized under an execution, but was part of my necessary household furniture, and as such is exempt from execution under the California Code of Civil Procedure, section 690, and I am a householder supporting a family.]

VI. The said property is worth . . . dollars.

VII. I am the plaintiff in the above-entitled action, and said action was commenced on the . . . day of . . . , 19.., and no answer has been filed therein.

[JURAT.] A. B.

§ 2589. Allegation of exemption from execution.

Form No. 706.

I am a music-teacher by occupation, and the said piano is actually used by me in giving instruction.

[Or, I am a physician, and said horse and buggy is used by me in the legitimate practice of my profession, and is necessary to enable me to carry on the practice of my profession.]

§ 2590. Alleged cause of detention—Possession obtained by fraud.

Form No. 707.

That the alleged cause of such detention, according to my best knowledge, information, and belief, is as follows: That the defendant claims to have purchased the same from me, but said pretended purchase was procured by fraud on the part of said defendant, in representing himself to be solvent, and worth . . . dollars, when in fact he was insolvent, and wholly unable to pay his debts, and well knew the fact to be, and made such representations of his solvency to me with intent to deceive and defraud me; and relying on said representations, I parted with possession of said goods.

§ 2591. Right of possession under special agreement.

Form No. 708.

That I am lawfully entitled to the immediate possession of the property hereinafter mentioned, by virtue of an agreement between me and the above-named C. D., of which the following is a copy: [here set out the agreement, or in any other manner show title, by stating facts]; and that I claim possession, as aforesaid, of the following property, to-wit: [Describe property.]

§ 2592. Affidavit by one having special property as bailee for hire.

Form No. 709.

[TITLE.]

[VENUE.]

A. B., being duly sworn, says:

That he is the plaintiff [or, the agent or the attorney of the plaintiff] in the above-entitled action, and makes this affidavit on his own [or, in said plaintiff's] behalf.

That the plaintiff is lawfully entitled to the immediate possession of the goods hereinafter described, by virtue of a special property therein arising out of the following facts, to-wit: that said goods were deposited with plaintiff for storage by their general owner, E. F., for . . . months, on an agreement by E. F. to pay the plaintiff storage therefor, which storage is worth . . . dollars; and they have been taken from the plaintiff without his consent, and without payment of said storage; and that the plaintiff claims possession, as aforesaid, of the following-described property: [Describe property.]

That the said property is wrongfully detained from said plaintiff by said defendant at . . . , in the county of . . . , and state aforesaid; that the alleged cause of such detention, according to the best of deponent's knowledge, information, and belief, is that the said C. D. claims the right to retain possession thereof as security for the payment of a certain sum of money alleged to have been loaned to one E. F. by C. D., upon a pledge of said property with said C. D. by said E. F., [although in fact said E. F. was not the owner of said property, and had no right to pledge the same].

That the said property, or any part thereof, has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of said plaintiff; and that the actual value of said property is . . . dollars.

A. B.

Subscribed and sworn to before me, this . . . day of . . . , 19..

G. H., Notary Public.

§ 2593. Averment of right of possession as pledgee.

Form No. 710.

The goods hereinafter mentioned were delivered to me by the said defendant, as a security for the payment of . . . dollars; and the said defendant, unknown to me, took away said property from my possession against my will, and now refuses to return the same, while the said sum of money is still due and unpaid, and the said goods and chattels are my only security therefor; and I am entitled to and claim immediate possession thereof. Said goods are described as follows: [Description of goods.]

§ 2594. Allegation of right of possession as lessee.

Form No. 711.

That I hired the goods hereinafter mentioned, of the said defendant, for the term of . . . months, and paid him therefor the sum of . . . dollars; and that said time has not yet expired, and the said defendant unlawfully got possession of said goods, and now wrongfully detains them from my possession. Said goods are described as follows: [Description of goods.]

§ 2595. Requisition to take property indorsed on the affidavit.

Form No. 712.

STATE OF CALIFORNIA, }
. . . COUNTY OF . . . } ss.

To the Sheriff of the County of . . .

You are hereby ordered and required to take from the defendant, C. D., the property within described.

[DATE.] E. F., Attorney for Plaintiff.

§ 2596. Undertaking on claim and delivery of personal property.

Form No. 713.

[TITLE.]

Whereas, it is alleged by the plaintiff in the above-entitled action that the defendant in the said action has in his possession and unjustly detains certain personal property belonging to the said plaintiff, to the said possession of which the said plaintiff is lawfully entitled, of the value of . . . dollars;

And whereas, the said plaintiff, being desirous of having the said personal property delivered to . . . , and by indorsement in writing upon the affidavit has required the sheriff of the said county of . . . to take the said property from the said defendant:

Now, therefore, we, the undersigned, residents of the said . . . county, in consideration of the premises, and of the delivery of said property to the said plaintiff, do hereby undertake and acknowledge to the effect that we are jointly and severally bound in the sum of . . . dollars (being double the value of said property as stated in the affidavit), for the prosecution of the said action, for the return of the said property to the said defendant, if the return thereof be adjudged, and for the payment to the

said defendant of such sum as may from any cause be recovered against the said plaintiff.

[DATE.] [SIGNATURES AND SEALS.]

[Affidavit of qualification as in form No. 677.]

[Approval as in form No. 718.]

§ 2597. Notice of exception to sufficiency of sureties on undertaking.

Form No. 714.

[TITLE.]

Sir: You will please take notice, that the defendant in the above-entitled action does not accept the undertaking given on the part of the plaintiff in the said action, upon your taking the personal property claimed by him, but expressly excepts to the same, and to the sufficiency of the sureties thereto; and that such sureties, and each of them, are required to justify, as provided by law.

Dated this . . . day of . . . , 19..

A. B., Attorney for Defendant.

To . . . , Sheriff of the said County of . . .

§ 2598. Notice of motion to set aside proceedings.

Form No. 715.

[TITLE.]

To . . . , Plaintiff's Attorney:

Take notice, that on [the annexed affidavit, and on the complaint and all the proceedings in this action], the undersigned will move the court, at . . . , on the . . . day of . . . , 19.., at . . . o'clock, A. M., or as soon thereafter as counsel can be heard, that the affidavit made by the plaintiff in this action, and the requisition to the sheriff of the county of . . . , indorsed thereon, and all proceedings taken by the plaintiff or by the said sheriff, respectively, by virtue thereof, may be set aside as void [and irregular, for that, etc., specifying irregularity complained of], and that the property taken by the said sheriff under said affidavit and requisition may be restored by him to the said defendant; and for such other or further relief as may be just [and for the costs of this motion].

[DATE.] [SIGNATURE.]

§ 2599. Notice to sheriff to return the property.

Form No. 716.

[TITLE.]

To . . . , Sheriff of . . . County:

I hereby require that you return to me the personal property taken by you in this action: [Describe property.]

[DATE.] E. F., Attorney for Defendant.

§ 2600. Undertaking for a return to defendant on claim and delivery of personal property.

Form No. 717.

[TITLE.]

I. Whereas, . . . , sheriff of the city and county of . . . , state of . . . , under and by virtue of an order and requirement duly made and issued in the above-entitled action, and to him directed, did, on the . . . day of . . . , 19.., take from the possession of the defendant in the said action the following-described personal property, to-wit: [Describe property.]

II. And whereas, the said defendant is desirous that the said property be redelivered to . . . by the said sheriff:

III. Now, therefore, we, the undersigned, in consideration of the premises, and of the said redelivery of the said property from the said sheriff to the said defendant, do undertake, promise, and acknowledge to the effect that we are jointly and severally bound unto the said sheriff, in the sum of . . . dollars (being double the value of the said property, as stated in the affidavit of the plaintiff), for the delivery thereof to the said plaintiff if such delivery be adjudged, and for the payment to . . . of such sum as may for any cause be recovered against the said defendant.

Dated this . . . day of . . . , 19..

[SIGNATURES AND SEALS.]

[Affidavit of qualification as in form No. 677.]

§ 2601. Approval by sheriff.

Form No. 718.

I approve the within undertaking, both as to form and to the sufficiency of the sureties thereof.

[DATE.] G. H., Sheriff of . . . County.

§ 2602. Notice of justification of defendant's sureties.

Form No. 719.

[TITLE.]

To E. F., Plaintiff's Attorney:

Take notice, that the sureties in the undertaking, of which a copy is annexed [or, describe the undertaking], excepted to by plaintiff, will justify before the Hon. . . . , judge of the superior court of the state of . . . , county of . . . , at chambers, in the courthouse of the city of . . . , on the . . . day of . . . , 19.., at . . . o'clock in the . . . noon.

[DATE.] G. H., Attorney for Defendant.

§ 2603. Justification of sureties before officer, pursuant to notice.

Form No. 720.

[TITLE.]

On this . . . day of . . . , 19.., at . . . , pursuant to due notice, personally attended before me, the undersigned, circuit judge of said court [or, insert official title], G. H. and J. K., the sureties of C. D., the defendant in this action, upon his undertaking to obtain a return of the property, the subject of the action, to justify as such sureties.

And the said G. H., being first duly sworn, for himself says, in answer to interrogatories put to him: [Here state his answers as to his responsibility as surety.]

And the said J. K., being first duly sworn, for himself says, on like interrogatories: [Here set out his statement.] G. H.

[JURAT.] J. K.

[To be annexed to the undertaking.]

[Allowance to be indorsed on undertaking.]

[VENUE.]

This day attended before me the within-named G. H. and J. K., sureties upon the within undertaking, and justified before me; and I find said bail sufficient, and allow the same.

Dated, . . . , 19.. E. F., [official title].

§ 2604. Affidavit of claim by third person.

Form No. 721.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says, as follows:

I. I am the sole owner in my own right and entitled to the

possession of certain personal property taken by the sheriff of the county of . . . , in this action, which property is described as follows: [Description of property.]

II. That on the . . . day of . . . , 19.. , I purchased the same from one M. N., of . . . , and paid him . . . dollars therefor, and I have not in any way sold or disposed of the same.

[JURAT.] [SIGNATURE.]

§ 2605. Notice to sheriff to accompany affidavit.

Form No. 722.

[TITLE.]

To S. H., Sheriff of the County of . . . :

Please take notice, that I claim the personal property mentioned in the affidavit herewith served, and require you to deliver the same to me.

[DATE.] [SIGNATURE.]

§ 2606. Notice to plaintiff to indemnify sheriff.

Form No. 723.

[TITLE.]

To . . . , Plaintiff's Attorney:

Please take notice, that . . . claims the property taken by me in this action, and that I require the plaintiff to indemnify me, or I shall not keep the property, nor deliver it to the plaintiff.

[DATE.] S. T., Sheriff.

§ 2607. Appraisement.

Form No. 724.

[TITLE.]

[VENUE.]

We, the undersigned appraisers, selected to examine and appraise the property hereinafter described, which was taken by R. S., sheriff of . . . county, by virtue of a writ of replevin issued out of the clerk's office of the district court in favor of A. B. against C. D., defendant in said action, having been duly sworn, do hereby report that we have valued said property according to its fair value at this time, and that the schedule hereto annexed contains a correct inventory of said property, and that the values therein affixed to each article respectively are the fair values thereof, viz.: [Describe each article, and give value.]

Signed this . . . day of . . . , 19.. L. M.

[VENUE.] N. O.

L. M. and N. O., being each duly sworn, each for himself deposes and says, that the foregoing is a just and true appraisement of the property therein described, to the best of his knowledge and belief.

L. M.

[JURAT.] N. O.

§ 2608. Undertaking of indemnity.

Form No. 725.

[TITLE.]

Whereas, the plaintiff has claimed the following property [describing it], and T. S., of . . . , claims the same as his property:

Now, therefore, we, L. M., of . . . , merchant, and N. O., of . . . , banker, undertake, in the sum of . . . dollars, to indemnify the sheriff of the county of . . . against the claim of the said T. S., in consideration that the said property be delivered to the plaintiff.

[DATE.] [SIGNATURES AND SEALS.]

[Affidavit of qualification as in No. 677.]

§ 2609. Petition for intervention by third person.

Form No. 726.

[TITLE.]

To the Honorable the . . . Court for . . . County:

The petition of E. C., of . . . , in said county, respectfully represents:

That the above-entitled action is now pending in this court for the recovery by said plaintiff from the defendant of the following-described personal property, to-wit, [describe same], which said action has not yet proceeded to trial or judgment;

That your petitioner is the sole and absolute owner of said property, and entitled to immediate possession thereof, and that neither of the parties to this action have any title or interest in said property, or any rightful claim to the possession thereof:

Wherefore, petitioner prays that he be made a party defendant in this action, and that the proper amendment may be made for that purpose, and for such further order as may be just.

[JURAT.] E. F., Petitioner.

[To be served on both plaintiff and defendant with the order to show cause as in form No. 727.]

§ 2610. Order to show cause in intervention proceedings.

Form No. 727.

[TITLE.]

On reading and filing the petition of E. F., attached hereto, and the papers on file in this action, and on motion of L. M., attorney for said petitioner:

It is ordered, that the plaintiff and defendant in this action show cause before the court at . . . , on the . . . day of . . . , 19.., or as soon thereafter as counsel can be heard, why an order should not be made letting the said E. F., petitioner, intervene in this action as a claimant for said property described in the complaint herein, and that the proper amendments be made to allow such intervention and setting up of such claim, granting petitioner such other order or relief as may be just.

It is further ordered, that a copy of the said petition and this order be served on the plaintiff and defendant herein, on or before the . . . day of . . . , 19.., and that until the hearing of said petition all proceedings herein be stayed.

By the Court: I. K., Circuit Judge.

§ 2611. Order allowing intervention and amendment.

Form No. 728.

[TITLE.]

The petition of E. F., coming on to be heard this . . . day of . . . , 19.., upon the order to show cause, the said petition and the pleadings and papers on file in this action, and after hearing L. M., Esq., attorney for the petitioner, and N. O., Esq., of counsel for the plaintiff, and the court being advised in the premises, on motion of L. M., Esq., attorney for the petitioner:

It is ordered, that the said E. F., petitioner, be let in as an additional defendant in this action;

That the summons and complaint herein be amended to make him such defendant, with proper allegations for that purpose, as the plaintiff may be advised; and that the said intervening defendant have twenty days after service upon him of the amended summons in which to plead thereto, as he may be advised.

Dated, . . . , 19..

By the Court: R. S., Judge.

§ 2612. Alternative judgment for plaintiff in replevin.

Form No. 729.

[TITLE.]

This action having been tried before the court and a jury, and the jury having rendered their verdict, wherein they find for the plaintiff that he is the owner of, and entitled to, the possession of the property described in the complaint, and assess the value thereof at the sum of . . . dollars, and the plaintiff's damages for the detention thereof by the defendant at the sum of . . . dollars;

And it appearing from the return of the sheriff herein, and from the undertaking filed herein on the part of the defendant, that the said property was delivered to the defendant, pursuant to the statute, and that G. H. and J. K. are his sureties, who signed said undertaking in the sum of . . . dollars, pursuant to said statute, and to the effect that they were bound, as therein required, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment of such sum to the plaintiff as might for any cause be recovered against the defendant;

And the plaintiff, in open court, having elected to take judgment for the recovery of possession of the property described in the complaint, or the value thereof in case a delivery cannot be had:

Now, on motion of L. M., attorney for plaintiff,—

It is adjudged, that A. B., the plaintiff, do have and recover of C. D., defendant, and G. H. and J. K., his sureties, the possession of the property described in the complaint, as follows: [here describe the property], together with . . . dollars, his damages assessed as aforesaid, for such detention; and in case a delivery cannot be had of said property, then that said plaintiff do have and recover of said defendant and his said sureties the sum of . . . dollars, the value of said property, in addition to his damages, together with the sum of . . . dollars, the costs of this action as taxed.

Dated and entered this . . . day of . . . , 19..

By the Court: N. O., Clerk.

CHAPTER LXXXVII.

ATTACHMENT.

§ 2613. In general.—The original design of the writ of attachment was to secure the appearance of one who had disregarded the original summons, by taking possession of his property as a pledge.[1] By an extension of this principle, in the New England states, property attached remains in the custody of the law, after an appearance, until final judgment in the suit.[2] And in the same states the attachment is an incident of the summons in all actions *ex contractu*. Elsewhere the writ issues only on affidavit, and after the giving of bond by the plaintiff, to secure the defendant against any damage from wrongful attachment.[2a]

In California, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment in the manner provided by statute, in the following cases: 1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff or the person to whom the security was given, become valueless; 2. In an action upon a contract, express or implied, against a defendant not residing in the state; 3. In an action against a defendant not residing in the state, to recover a sum of money as damages, arising from an injury to property in the state, in consequence of negligence, fraud, or other wrongful act.[3] Number three of the above cases was added by amendment in the year 1905. Prior to that time

1 3 Bl. Comm. 280.

2 Bond v. Ward, 7 Mass. 127, 5 Am. Dec. 28.

2a Bouv. Law Dict.

3 Cal. Code Civ. Proc., § 537. See Alaska Codes, pt. 4, ch. 14, § 136; Ariz. Civ. Code, par. 333; Idaho Rev. Codes, § 4302; Mont. Rev. Codes, § 890; Nev. Comp. Laws, § 2550; Or. B. & C. Codes, § 297; Utah Rev. Stats., § 3066; Wash. Bal. Codes, § 5351; Wyo. Rev. Stats., § 3989.

a writ of attachment issued in an action not based upon a contract, express or implied, was void.[4]

It is well settled that attachment proceedings are statutory and special, and must be strictly pursued, and when a party relies upon his attachment lien as a remedy, he must follow the provisions of the attachment law.[5] Since it is a creature of statute, its existence and operation in any case can continue no longer than the statute provides it may.[6] It is a remedy given only in case of indebtedness arising upon contract.[7]

Attachment proceedings are incidental to the main case, and form no part of the pleadings proper.[8] Section 171 of the Washington Code of Civil Procedure, providing for the commencement of a civil action by the filing of a complaint, has not been repealed, in so far as the issuance of a writ of attachment is concerned, by the passage of the Practice Act of 1893, declaring that civil actions in the superior courts shall be commenced by the service of a summons.[9] It is not a distinct proceeding in the nature of an action *in rem*, but auxiliary to the main action.[10] A judgment *in rem* binds the thing itself as against all the world, but in a case in which the law requires that parties shall be brought before the court, the sentence binds those only who are parties.[11] It has been held that where property in the hands of a third person is arrested on a claim to a specific lien upon it, that constitutes the suit a suit *in rem*; it is not a foreign attachment, whether the third person holds the property as owner of it in his own right or as trustee of the debtor.[12] An attachment is ancillary where a personal judgment is sought, but is an original attachment where a judgment *in rem* only is sought.[13]

4 Mudge v. Steinhart, 78 Cal. 34, 12 Am. St. Rep. 17, 20 Pac. 147; Kohler v. Agassiz, 99 Cal. 12, 33 Pac. 741.

5 Roberts v. Landecker, 9 Cal. 262. Compare Fisher v. Consequa, 2 Wash. C. C. 382, Fed. Cas. No. 4816; Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11133; James v. Jenkins, Hempst. 189, Fed. Cas. No. 718a; Gow v. Marshall, 90 Cal. 565, 27 Pac. 422; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619; Murphy v. Jack, 76 Hun, 356; Jaffray v. Wolf, 1 Okla. 312, 33 Pac. 945.

6 Loveland v. Alvord Min. Co., 76 Cal. 562, 18 Pac. 682.

7 Griswold v. Sharpe, 2 Cal. 17; Suksdorff v. Bigham, 13 Or. 369, 12 Pac. 818.

8 Jordan v. Frank, 1 N. Dak. 206, 46 N. W. 171.

9 Cosh-Murry Co. v. Tuttich, 10 Wash. 449, 38 Pac. 1134.

10 Low v. Adams, 6 Cal. 277.

11 Mankin v. Chandler, 2 Brock. (Marsh.) 125, Fed. Cas. No. 9030.

12 Reed v. Hussey, 1 Blatchf. & H. 525, Fed. Cas. No. 11646.

13 Southern California Fruit Exchange v. Stamm, 9 N. Mex. 361, 54 Pac. 345.

§ 2614. When attachment may issue.—An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it.[14] Although, under the California code, a writ of attachment cannot properly issue until after the commencement of the suit to which it is only auxiliary, still there seems to be no objection to a complete preparation of all the papers requisite to the writ before or at the time the complaint is prepared, so that the affidavit and undertaking in attachment be not filed in advance of the complaint to which it is incident.[15] The grounds for the attachment must exist at the time the writ is issued; and where the affidavit is made twenty-eight days before suit is brought, and the ground is that the debt is not secured, the writ should be discharged.[16]

An attachment issued before the maturity of the debt is *prima facie* void as against a subsequent attachment; but where the goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, on the ground that the debt on which the attachment is issued is equitably due, and other creditors, subsequently attaching, cannot complain that the suit was prematurely brought.[17] If the writ is issued on a debt not legally or equitably due, it is void as against creditors whose rights are injuriously affected by it.[18] In Colorado, a writ of attachment may, under certain circumstances, issue upon a debt or liability not due, as well as upon claims that are due; but where neither the complaint nor the affidavit of attachment states that the action includes a claim not due, the recovery may properly be restricted to such claims as are due.[19] A subsequent attaching creditor cannot postpone the lien of the first attachment, unless the plaintiff in the first action commenced his action fraudulently.[20]

§ 2615. Jurisdiction.—An attachment may be brought in any county where the non-resident has property, though he is at the time personally present in another county of the state, and service of summons on him in such county will give the court juris-

14 Low v. Henry, 9 Cal. 538.

15 Wheeler v. Farmer, 38 Cal. 203.

16 Murphy, Grant & Co. v. Zaspel, 11 Idaho, 145, 81 Pac. 301.

17 Patrick v. Montader, 13 Cal. 434.

18 Davis v. Eppinger, 18 Cal. 378, 79 Am. Dec. 184.

19 Kimball v. Lyon, 19 Colo. 266, 35 Pac. 44. See Woods v. Tanquary, 3 Colo. App. 515, 34 Pac. 737; Miller v. Godfrey, 1 Colo. App. 177, 27 Pac. 1016; Deering v. Warren, 1 S. Dak. 35, 44 N. W. 1068.

20 Coghill v. Marks, 29 Cal. 673.

diction, at least to the extent of the attached property.[21] In an attachment suit before a justice of the peace, the fact that defendant is out of the state does not relieve plaintiff from issuing summons, when service may be had by publication.[22] Where the complaint contains sufficient averments to give the court jurisdiction, and the attachment is rightfully issued thereon, no subsequent proceedings in the court can affect its standing.[23] A probate court has no jurisdiction to issue an attachment to be levied on real estate.[24] No appeal will lie to the district court from an order of the probate court discharging an attachment.[25] The court has power to have a levy on exempt property set aside.[26] The general statute of 1901 (No. 5053), relating to jurisdiction of the supreme court to reverse a judgment vacating an injunction, applies only to processes to reverse interlocutory orders discharging or modifying an attachment or a temporary injunction.[27]

A probate judge has no authority to issue an order of attachment in an action pending in the district court on a claim not due, and any levy of an order of attachment issued only by the probate judge is void.[28] While an attachment proceeding without personal service forms no basis for a personal judgment in the state of New York, and can affect only property found within the jurisdiction, Idaho county warrants, made payable to bearer, and capable of transfer without indorsement, found within the state of New York, are there subject to attachment. The *res* being within the state, the court had jurisdiction of it.[29] A judgment sustaining an attachment against a non-resident, and directing the sale of property attached, is not subject to collateral attack for failure to serve the attachment writ on the defendant.[30]

§ 2616. When attachment is or is not authorized—On contract.—It is unnecessary, under section 537 of the California Code of Civil Procedure, authorizing the issuance of an attach-

21 Reynolds v. Williamson, 68 Kan. 239, 74 Pac. 1122.

22 Cheeseman v. Fenton, 13 Wyo. 436, 110 Am. St. Rep. 1010, 80 Pac. 823.

23 Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

24 Goodfellow Shoe Co. v. Griffith, 13 Okla. 51, 74 Pac. 109.

25 Ferdinand Westheimer & Sons v. Hahn, 15 Okla. 49, 78 Pac. 378.

26 Holmes v. Marshall, 145 Cal. 777, 104 Am. St. Rep. 86, 79 Pac. 534, 69 L. R. A. 67.

27 Shanks v. Pearson, 70 Kan. 160, 78 Pac. 446.

28 Noyes v. Phipps, 10 Kan. App. 580, 63 Pac. 659.

29 Thum v. Pingree, 21 Utah, 348, 61 Pac. 18.

30 Burris v. Craig, 34 Colo. 383, 82 Pac. 944.

ment, that the amount due should appear upon the face of the contract sued on; but there must appear a basis upon which the damages can be determined.[31] An action on a bond to insure the completion of a contract by the principal is not an action on contract for the "direct payment" of money, and does not authorize an attachment.[32] The contract of an indorser of a note is a contract for the direct payment of money.[32a] An action for a broker's services, to be performed in Minnesota, plaintiff residing in that state, cannot, in an action to recover commissions, authorize an attachment against a defendant residing in California under the above section.[33] An action against a stockholder to enforce the double liability imposed by statute is an action on contract, in which plaintiff may sue out an attachment, notwithstanding the proceeding is equitable in its nature.[34]

An express contract is one the terms of which are stated in words.[35] An implied contract is one the existence and terms of which are manifested by conduct.[36] Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes every man undertakes to perform.[37] There must be a debt.[38] Direct payment does not mean the opposite of "collateral." That would exempt sureties, guarantors, etc. It means that the debt must be liquidated.[39] An action against a stockholder of a corporation to recover his proportion of a debt of the corporation is an action upon a contract, within the meaning of section 537 of the California Code of Civil Procedure, relative to attachment.[40] A bail-bond in a criminal case is a contract for the direct payment of money;[41] as is also the official bond of a county treasurer.[42]

An attachment having been issued to compel the refunding of money paid by plaintiff on an agreement to build a certain machine, which had not been built, a motion was made to dis-

31 De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

32 Ancient Order of Hibernians v. Sparrow, 29 Mont. 132, 101 Am. St. Rep. 563, 74 Pac. 197, 64 L. R. A. 128.

32a Armstrong v. Slick, 14 Idaho, 208, 93 Pac. 775.

33 Drake v. DeWitt, 1 Cal. App. 617, 82 Pac. 982.

34 Adams v. Clark, 36 Colo. 65, 85 Pac. 642.

35 Cal. Civ. Code, § 1620.

36 Cal. Civ. Code, § 1621.

37 Bouv. Law Dict.

38 Cal. Code Civ. Proc., § 538.

39 Hathaway v. Davis, 33 Cal. 165.

40 Kennedy v. California Sav. Bk., 97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

41 San Francisco v. Brader, 50 Cal. 506.

42 Monterey County v. McKee, 51 Cal. 255.

solve the attachment, on the grounds that the complaint did not state a cause of action "upon a contract, express or implied, for the direct payment of money." The complaint set out the payment of money in advance, as a part of the contract price, and the expiration of the time for the performance of the contract; and where money has been paid upon a consideration which has entirely failed, the law implies a promise to refund. Such a case is within the terms of the statute defining cases in which attachment may issue.[43] In an action for damages from a collision, there is no debt on contract and no right to attachment.[44]

In Kansas, the remedy of attachment on claims not due is a right given to the creditor.[45] A complaint may disclose the fact that plaintiff discharged the contract so that its breach by defendant does not form a basis for attachment, and thus defeat the plaintiff in his application.[46] Where a bank clerk defaults, the bank may waive the tort, sue on contract, and attach his property, where he is a non-resident of the state.[47]

§ 2617. The same—On contract, no security given.—Where suit is based on a purchase-money note, providing that title shall not pass until the note is paid, and that the payee has power to take possession, attachment cannot issue for the price.[48] Where bonds of a projected railroad were taken as security, and the bonds never were of any value, the plaintiff may sue out an attachment, on the ground of no security being given.[49]

§ 2618. The same—In suits in equity.—Under the Washington statute,[49a] providing that plaintiff may attach the property of defendant as security for the satisfaction of such judgment as he may recover, an attachment may issue in an equitable as well as a legal action, when the object is to recover money, the amount of which is specified.[50] If the action is one in which, in

43 Santa Clara Peat Fuel Co. v. Tuck, 53 Cal. 304. See, also, for breach of contract, Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Lankershim Ranch etc. Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

44 Griswold v. Sharpe, 2 Cal. 24.

45 Nelson v. Stull, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590.

46 Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653.

47 Lipscomb v. Citizens' Bank, 66 Kan. 243, 71 Pac. 583.

48 Mark Means Transfer Co. v. Mackinzie, 9 Idaho, 165, 73 Pac. 135.

49 McPhee v. Townsend, 139 Cal. 638, 73 Pac. 584.

49a 2 Bal. Codes, § 5350.

50 Bingham v. Keylor, 19 Wash. 555, 53 Pac. 729.

addition to specific relief, a money judgment may be rendered, and the attachment is authorized by statute, the fact that such an action would formerly have been in equity only will not defeat it.[51]

§ 2619. The same—Defendant a non-resident.—Where the cause of action arises wholly within the limits of the territory, and the defendant is a non-resident, the plaintiff may have the assistance of an attachment in a civil action on tort.[52] Where a citizen of the territory removes all his property to another state, it will not authorize a levy of attachment, unless made with intent to defraud.[53] Where vacant property belonging to a non-resident was conveyed by a trust-deed, void on its face, the property may be attached without the necessity of serving or mailing a copy of the writ to the grantee of the trust-deed.[54]

§ 2620. The same—Against administrators.—After the decree of distribution, money in the hands of the administrator, distributed to an heir or devisee, may be garnished by a creditor of the distributee, or may be reached by proceedings supplementary to execution.[55]

§ 2621. The same—Against corporations.—Under section 92 of the Colorado code, attachment will not lie against a domestic corporation which has either its chief office or place of business within the state.[56]

§ 2622. The same—Against the sheriff.—An ex-sheriff cannot be garnished, except as a private individual.[57] Property and assets brought within the control of a court of competent jurisdiction by the appointment of a receiver are *in custodia legis*, and not subject to seizure by attachment or garnishment process by other courts.[58]

§ 2623. The same—Against tenant in common.—Where V., a landowner, agreed with B. to let the latter work his land on

51 De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

52 Kidd v. Seifert, 11 Okla. 32, 65 Pac. 931.

53 Dunn v. Claunch, 13 Okla. 577, 76 Pac. 143.

54 Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

55 Estate of Nerac, 35 Cal. 392, 95 Am. Dec. 111.

56 Rocky Mountain Oil Co. v. Central Nat. Bank, 29 Colo. 129, 67 Pac. 153.

57 Graham v. Endicott, 7 Cal. 144.

58 Missouri Pacific R. R. Co. v. Love, 61 Kan. 433, 59 Pac. 1072.

shares, V. to receive one third of the grain, after it was in sacks, as his share, a sheriff having an attachment against V. might levy on his interest in the grain, and, to effect this, might take and retain possession of the entire quantity of grain; but he can sell under the execution only the individual one third interest of V., and the purchaser thereof becomes a tenant in common with B.[59] In an attachment in a suit of B. & Co. against V., Y., and L., as the firm of V. & Co., under which defendant, as sheriff, seized plaintiff's stock in trade, claiming that L. was a partner of plaintiff, the plaintiff, in an action for damages, cannot, as a criterion of damages, offer proof of injury to his business as a merchant.[60]

§ 2624. **Parties.**—An assignee of a contract of conditional sale cannot have an attachment, on the failure of the purchaser to make a payment; and where the sale provides for the retention of title until payment is made, the assignee cannot have an attachment until the property sold is exhausted.[61] Where the affidavit is not denied, in that the affiants were the defendants in attachment, their names having been slightly changed in the process, the court is justified in treating them as defendants.[62]

§ 2625. **Attachment will lie in case of fraud.**—The receipt of a large amount of merchandise, which is not accounted for in a subsequent assignment to creditors, is not in itself sufficient to support fraudulent concealment in an affidavit for attachment.[63] That a debt was fraudulently contracted does not furnish grounds for seizure of the goods under attachment when they are covered by additional assignments by the debtor.[64] The right of the assignee of a debt to procure a writ of attachment for fraud exists only against the immediate assignor.[65] Where a citizen of the territory removes all his property to another state, it does not authorize a levy of attachment, unless it is done with the intention to defraud.[66] A creditor defrauded by the transfer of

59 Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147; Smith v. Cunningham, 67 Cal. 262, 7 Pac. 679.

60 Dexter v. Paugh, 18 Cal. 373.

61 Barton v. Groseclose, 11 Idaho, 227, 81 Pac. 623.

62 Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

63 First Nat. Bank v. Lesser, 10 N. Mex. 700, 65 Pac. 179.

64 Marlin v. Teichgraeber, 63 Kan. 521, 66 Pac. 234.

65 Thwing v. Winkler, 13 Okla. 643, 75 Pac. 1126.

66 Dunn v. Claunch, 13 Okla. 577, 76 Pac. 143.

the debtor's property may proceed against the property by attachment.[67]

Where a husband, for a valuable consideration, transfers his interest in a mining claim to his wife, his creditors cannot attach his property on the grounds of his making a fraudulent conveyance to hinder his creditors, and this though the wife might not be able to enforce her right to the interest in the mine in a suit at law.[68] A mortgage on a stock of goods which allows the mortgagor to retain possession of the goods, and to sell them, without applying the proceeds to the discharge of the mortgage, is a fraud on other creditors, and sufficient grounds for an attachment.[69] Where a creditor has neglected for eight years to collect a debt that he might have collected by suit, he is held to have waived his right to attachment when the debtor's land is afterwards transferred to defraud the creditors.[70]

§ 2626. Property that may or may not be attached.—In California, all debts due the defendant may be attached.[71] Equitable demands cannot be garnished.[72] Money in a savings-bank is liable to garnishment, notwithstanding its by-laws, assented to by the debtor, make his pass-book, in which his account is kept, transferable to order.[73] Bonds of a railroad company, in the hands of an agent to be sold, are not subject to attachment.[74] In New York, a debt from a debtor not within the state, to a creditor also not within the state, is not liable to attachment, although the evidence of the debt is within the state.[75]

All property of the defendant in the state, not exempt from execution, may be attached, and, if a judgment be recovered, may be sold to satisfy the judgment and execution.[76] But property of a deceased debtor is not liable to attachment.[77] The property of a building and loan association is subject to attach-

67 Colorado Trading etc. Co. v. Acres Commission Co., 18 Colo. App. 253, 70 Pac. 954.

68 Loveland v. Kearney, 14 Colo. App. 463, 60 Pac. 584.

69 Ranney-Alton Mercantile Co. v. Watson, 10 Okla. 675, 65 Pac. 98.

70 Loveland v. Kearney, 14 Colo. App. 463, 60 Pac. 584.

71 Cal. Code Civ. Proc., § 541.

72 Hassie v. God Is With Us Cong., 35 Cal. 378.

73 Witte v. Vincenot, 43 Cal. 325.

74 Coddington v. Gilbert, 17 N. Y. 489.

75 Story's Conflict of Laws, §§ 362, 399; Tingley v. Bateman, 10 Mass. 343; Bates v. New Orleans etc. R. R. Co., 4 Abb. Pr. 72.

76 Cal Code Civ. Proc., § 541.

77 Patterson v. McLaughlin, 1 Cranch C. C. 352, Fed. Cas. No. 10828; Henderson v. Henderson, 5 Cranch C. C. 469, Fed. Cas. No. 6353.

ment like property of other private corporations, and such lien is not destroyed by a judgment enjoining further transactions of business.[78] A landlord is entitled to an attachment on the tenant's crops, where the rent is payable in shares of them, after the tenant has disposed of part of the crop. If the balance of the crop is sold on an order of court, the order should direct the payment of the landlord's share.[79]

A cash-register, not a part of the goods kept for sale, is not within the Washington statute concerning the sale of "stock of goods, wares, or merchandise" in bulk,[79a] and such register is not subject to attachment in the hands of the buyer, on suit of the judgment creditor of the seller.[80] An attachment of real estate alleged to have been fraudulently conveyed by a debtor cannot be sustained under a creditor's bill, where the claim has not been reduced to a judgment.[81] A steam-dredge, with an amalgamator attached, used in mining, does not come within the term "boat" as used in the Montana code,[81a] providing that any boat found within the waters of the territory is liable for certain debts, and to attachment therefor.[82]

§ 2627. **The same—Pledged property.**—Under the provisions of the California statute, while the interest of a pledgor of property is subject to execution, and may be reached in the hands of the pledgee, yet this can only be done by serving and enforcing a garnishment on the pledgee, and not by a seizure of the pledge;[83] but when pledged property is allowed to go into the pledgor's possession, it is subject to attachment by his creditors.[84] Where Idaho county warrants, the property of an Idaho banking concern, are pledged in New York city prior to the appointment of a receiver of the Idaho bank, they are liable to seizure in an attachment proceeding, under section 648 of the New York Code of Procedure, in an action brought by a creditor of the Idaho

78 Bories v. Union Building etc. Assoc., 141 Cal. 74, 74 Pac. 552.

79 Harmon v. Payton, 68 Kan. 67, 74 Pac. 618.

79a Sess. Laws 1901, ch. 109, p. 222.

80 Albrecht v. Cudihee, 37 Wash. 206, 79 Pac. 628.

81 Aigeltinger v. Einstein, 143 Cal. 609, 101 Am. St. Rep. 131, 77 Pac. 669.

81a Comp. Stats. 1887, div. 1, tit. 7, ch. 5

82 Dietrich v. Martin, 24 Mont. 145, 81 Am. St. Rep. 419, 60 Pac. 1087.

83 Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770.

84 Salinas City Bank v. Graves, 79 Cal. 192, 21 Pac. 732.

bank, subject only to the lien of the New York bank. They have their *situs* in New York, and are subject to attachment there.[85]

By the laws of Indiana, all the interest of a mortgagee, pledgee, or assignee of personal property is liable to be levied on and sold by execution, and the same interest may be reached by attachment.[86] In Massachusetts, property pledged, and on which the party has a lien, is not liable to the trustee process of attachment.[87] The pledgee has a special interest in the pledge, and is not bound to deliver it until his incumbrance is discharged.[88] So with goods consigned as security,[89] and with goods in a warehouse.[90] As a general rule, the interest conferred by a lien upon property is not subject to attachment.[91] But if the lienor removes his lien, the objection does not lie in the mouth of the debtor.[92] In Maine, a mortgagee may waive his lien and attach the same property.[93]

§ 2628. **The same—Mortgaged property.**—The policy of the law is that a creditor holding a security by way of "mortgage, lien, or pledge upon real or personal property," shall not resort to the summary process of attachment until he has exhausted his security. But such lien or pledge must be of a fixed, determined character, and capable of being enforced with certainty, and not depending on conditions.[94] A mortgagee has no attachable interest in the mortgaged premises.[95] The possessory right of a mortgagor may be attached, but when the possession fails, the right to detain under the attachment ceases.[96] The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession, as against the mortgagee, until foreclosure.[97] But before the mortgaged property is taken under the attachment, the officer

85 Thum v. Pingree, 21 Utah, 348, 61 Pac. 18.

86 Evans v. Darlington, 5 Blackf. 320; Gibson v. Stevens, 3 McLean, 551, Fed. Cas. No. 5401.

87 Badlam v. Tucker, 1 Pick. 389, 11 Am. Dec. 202.

88 Picquet v. Swan, 4 Mason, 443, Fed. Cas. No. 11133.

89 Grove v. Brien, 8 How. 429, 12 L. Ed. 1142.

90 Wilkes v. Ferris, 5 Johns. 335, 4 Am. Dec. 364; Pleasants v. Pendleton, 6 Rand. 473, 18 Am. Dec. 726.

91 Adone v. Jemison, 65 Tex. 680; Hanchett v. First Nat. Bank, 25 Ill. App. 274.

92 Meeker v. Wilson, 1 Gall. 419, Fed. Cas. No. 9392.

93 Whitney v. Farrar, 51 Me. 418.

94 Porter v. Brooks, 35 Cal. 199.

95 McGurren v. Garrity, 68 Cal. 566, 9 Pac. 839.

96 Fairbanks v. Bloomfield, 5 Duer, 434.

97 Halsey v. Martin, 22 Cal. 645; Cal. Civ. Code, § 2968.

must pay or tender to the mortgagee the amount of the mortgage debt and interest, or deposit the same with the county clerk or treasurer.[98] The proceeds of the property, when sold, must be applied first to the repayment of the sum paid the mortgagee, with interest.[99] A general creditor is not estopped from attaching property covered by a chattel mortgage which has not been duly filed, though he has "actual notice of the existence of such mortgage," under the statute providing that a mortgage of personal property shall be void as against creditors and subsequent purchasers, unless filed in the county where the property is situated.[100]

The attachment of a stock of goods as the property of H. is good, as against his parents, though he had previously executed to his wife a conveyance of an interest therein, there being no change in possession or management thereof, and though he testified that he located a mine in the name of himself, his father, and P., and that they traded the mine for the store business, and in making the trade were equal partners, and that he bought the interest of P., and that the father never took any part in locating the mine or in the workings of the store, or knew anything thereof, and that the partnership name was a mere fiction.[101]

§ 2629. The same—Partnership property.—Upon an attachment against property of one of several copartners, the sheriff may seize the leviable property of the copartnership, take it into his possession, and sell defendant's interest in so much as is necessary.[102] A levy on the partnership property where some of the partners are non-residents may be sustained.[103] In Michigan, an attachment against partnership property is unauthorized, unless grounds for issuing it exist against all the partners.[104]

§ 2630. The same—Property in custody of the law.—Property and assets brought within the control of a court of competent jurisdiction by the appointment of a receiver are *in custodia legis*, and not subject to seizure by attachment or garnishment process

98 Cal Civ. Code, § 2969.

99 Cal. Civ. Code, § 2970.

100 Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

101 Hammond v. Borgwardt, 126 Cal. 611, 59 Pac. 121.

102 Phillips v. Cook, 24 Wend. 389, 2 Hill, 47, note.

103 Brewster v. Honigsburger, 2 Code Rep. 50.

104 Edwards v. Hughes, 20 Mich. 289.

by any other court.[105] Money deposited with the sheriff by a defendant, to procure the release of an attachment, is in custody of the law; but when the parties, by mutual agreement, take it out of the hands of the sheriff, without any order or permission of court, and loan it out to third parties, these parties are not the bailees of the sheriff, and the money ceases to be in the custody of the law, and can only be reached on proceedings supplementary to execution, in the same manner as other debts are reached.[106] Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment.[107] Property in the custody of the law, or in the hands of a receiver appointed by a competent court, is not liable to seizure, without order from the court having the charge thereof.[108]

§ 2631. **The same—Goods in transit.**—Goods in transit are not liable to attachment in a suit against a corporation transferring the goods.[109] The right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee.[110] Goods in the custody of a railroad company *in transitu* within the territory are subject to attachment.[111]

§ 2632. **The same—Money in bank.**—The cashier of a bank is not liable as garnishee of the deposit by the debtor, for the cashier is not the debtor of the depositor.[112] An agent depositing money in his principal's name, and it in fact belonged to the principal; then an attaching creditor of the agent, when notified by the

105 Missouri Pacific Ry. Co. v. Love, 61 Kan. 433, 59 Pac. 1072.

106 Hathaway v. Brady, 26 Cal. 586.

107 Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414.

108 Yuba County v. Adams, 7 Cal. 35; Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491; Ford v. Judsonia Mercantile Co., 52 Ark. 426, 20 Am. St. Rep. 192, 12 S. W. 876, 6 L. R. A. 714; Stevenson v. Palmer, 14 Colo. 565, 20 Am. St. Rep. 295, 24 Pac. 5; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529. But see Adams v. Woods, 9 Cal. 28; Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 Am. St. Rep. 331, 26 Pac. 518, 12 L. R. A. 508.

109 Bates v. New Orleans etc. R. R. Co., 4 Abb. Pr. 72, 13 How. Pr. 516.

110 Blackman v. Pierce, 23 Cal. 508.

111 Santa Fe Pacific R. Co. v. Bossut, 10 N. Mex. 322, 62 Pac. 977.

112 Lewis v. Smith, 2 Cranch C. C. 571, Fed. Cas. No. 8332.

principal of his ownership of the fund, is in no better position than the agent. He has no interest.[113]

§ 2633. **The same—Money in the hands of bailee.**—A party placing money in the hands of another, for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited; nor does he part with the ownership by allowing it to be used for his benefit, though in the name of another. The money in the hands of the agent remains, as between him and the principal, the money of the principal. And an attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it has been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailee by reason of his having the money.[114]

§ 2634. **The same—Promissory note.**—The indebtedness of a maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. And such indebtedness, after maturity of the note, cannot be attached, unless the note is at the time in the possession of the defendant, from whom its delivery can be enforced on its payment in attachment.[115]

§ 2635. **The same—Shares of stock.**—The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and, if judgment be recovered, may be sold to satisfy the judgment execution.[116] Where shares of stock in a corporation have been regularly transferred as a security for a loan, the mortgagee

113 Farmers' etc. Nat. Bank v. King, 57 Pa. St. 202, 98 Am. Dec. 215.

114 Hardy v. Hunt, 11 Cal. 343, 70 Am. Dec. 787.

115 Gregory v. Higgins, 10 Cal. 339.

116 Cal. Code Civ. Proc., § 541.

is the only proper garnishee in a suit against the mortgagor, in order to attach his interest in the corporation. In such a case the corporation is no longer privy to the interest of the mortgagor, which is a mere equity in the hands of the mortgagee.[117] Money in the hands of one corporation which is a stockholder in another corporation, the legal title to which is in the latter, may be attached at the instance of a creditor of the latter.[118]

§ 2636. **The same—Securities.**—A creditor who holds as security an assignment from his debtor of a claim in favor of the debtor and against a third person is not "a debtor" of the debtor.[119] In California, taking a bill before maturity as collateral security changes the legal rights of the parties, as it operates as a surrender by the creditor of the right to attach the property of the debtor, and this surrender is a sufficient consideration for the security.[120] A bill of exchange may be considered as an assignment of the funds in the drawee's hands upon which it is drawn, and an attachment against the payee of the bill, levied on the fund, will not bind them against an indorsee of the bill suing to recover thereon in the name of the payee.[121] A draft by the defendant upon the garnishee in favor of a third person, before the attachment, is an assignment to the payee of the amount stated in the draft, and should be preferred to an attachment.[122] The attaching creditor is in no better condition than his debtor would have been in if the attachment had not been made.[123]

§ 2637. **The same—Assignments.**—A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of garnishment.[124] After the delivery and presentation of an order, the debt due by the drawee cannot be reached on attachment issued by the creditors of the drawer. As against any attempt by them to enforce its payment upon any such proceeding, the order is an effectual

117 Edwards v. Beugnot, 7 Cal. 162.

118 Hughes v. Oregonian Ry. Co., 11 Or. 158, 2 Pac. 94.

119 Deacon v. Oliver, 14 How. 610, 14 L Ed. 563.

120 Naglee v. Lyman, 14 Cal. 450.

121 Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3255.

122 United States v. Vaughan, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; Bank of N. A. v. McCall, 3 Binn. (Pa.) 338; King v. Gorsline, 4 Cranch C. C. 150, Fed. Cas. No. 7796.

123 Miller v. Hubbard, 4 Cranch C. C. 451, Fed. Cas. No. 9574.

124 Walling v. Miller, 15 Cal. 38.

protection, as it is also against the suit of the assignor to collect the amount, unless such suit is prosecuted for the benefit of the assignee.[125]

Plaintiff delivered to defendants gold-dust, to be by them forwarded to San Francisco, to be coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt for the sale. Defendants after this received coin made of the dust, and a creditor of C. attached the coin by garnishment. Defendants had no notice of the sale by C. to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin. It was held that the plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided; that C.'s right in the dust was a chose in action, which he could assign, as he had done, to plaintiff; and that neither C. nor his creditors then had any rights in it.[126] Notice to the judgment creditor of an assignment of chattels where possession has never been taken under the assignment, does not affect the right of the sheriff to seize the property in execution as the property of the assignor. And it seems it does not render the creditor liable for directing the seizure of the goods.[127]

§ 2638. The same—Contingent demand.—A contingent demand, while the contingency exists, is not attachable.[128] Where one is to receive a certain amount in bonds upon the completion of a piece of work, his interest in the bonds prior to the completion of the work is not subject to attachment.[129] In Massachusetts, it has been held that the wages of a sailor, being contingent upon the arrival of the ship, are not a debt until the ship has arrived, and not attachable until then.[130] Money due a seaman for wages is not attachable in the hands of a purser.[131]

125 Wheatley v. Strobe, 12 Cal. 92, 73 Am. Dec. 522.

126 Walling v. Miller, 15 Cal. 38.

127 Meeker v. Wilson, 1 Gall. 419, Fed. Cas. No. 9392.

128 Bates v. N. Orleans etc. Ry. Co., 4 Abb. Pr. 72.

129 Early v. Redwood City, 57 Cal. 193.

130 Wentworth v. Whittemore, 1 Mass. 471.

131 Buchanan v. Alexander, 4 How. 20, 11 L. Ed. 857. Compare Averill v. Tucker, 2 Cranch C. C. 544, Fed. Cas. No. 670.

The law of Louisiana, although it allows an attachment in certain cases for debts not yet due, does not apply to debts resting in mere contingency, and is confined in its operation to absconding debtors.[132]

§ 2639. **The same—Foreign debts.**—A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the act of the 29th of April, 1851.[133]

§ 2640. **The same—Equitable and legal demands.**—An equitable demand cannot be garnished. Garnishment reaches only legal debts which the defendant in attachment could enforce in his own name.[134] Unless the defendant in the attachment could have maintained under the common-law practice an action of debt or *indebitatus assumpsit* against the garnishee at the time the process of garnishment was served upon him, the garnishee process does not make the garnishee liable to the plaintiff in the attachment.[135] A. contracted to construct a building for B., who was to pay him in installments as the work progressed. C. then contracted with A. to do a part of the work, and to receive his pay in installments as his work progressed, and A. assigned to C. a part of the money to fall due from B. It was held that no such legal demand existed in favor of C. against B. as to support a garnishment by C.'s creditors.[136]

§ 2641. **The same—Vendor's lien.**—A vendor's lien for the unpaid purchase price of a tract of land, where the land has been conveyed by the vendee to a third party before action brought against the former by the vendor to recover said purchase price, is not of such fixed and determinate character as to bar the plaintiff in such action of the right to a writ of attachment against the property of the defendant therein.[137] If the plaintiff has a vendor's lien to secure his debt on real property out of the state, an attachment cannot issue. The vendor of real estate cannot take out an attachment for unpaid purchase money

132 Black v. Zacharie, 3 How. 483, 11 L. Ed. 690.

133 Dulton v. Shelton, 3 Cal. 206.

134 Witte v. Vincenot, 43 Cal. 325.

135 Hassie v. God Is With Us Cong., 35 Cal. 378.

136 Hassie v. God Is With Us Cong., 35 Cal. 378.

137 Porter v. Brooks, 35 Cal. 199. See Gessner v. Palmateer, 89 Cal. 89, 24 Pac. 608, 26 Pac. 789, 13 L. R. A. 187.

if he can enforce a lien for such purchase money. It matters not whether such a lien is one which courts of equity will enforce in favor of a vendor or whether it is one created by contract.[138]

§ 2642. Affidavit for attachment, what to contain.—The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in the state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) and that the defendant is a non-resident of the state; or,

3. That plaintiff's cause of action against defendant is one to recover a sum of money as damages (specifying the amount thereof) arising from an injury to property in the state in consequence of the negligence, fraud, or other wrongful act of defendant, and that the defendant is a non-resident of the state; and,

4. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant.[139]

An affidavit stating conjunctively that the amount of indebtedness is "over and above all legal set-offs and counterclaims" is a sufficient compliance with the requirements of the statute that the indebtedness must be shown to be "over and above all legal set-offs or counterclaims."[140] An affidavit in attachment stating the claim to be five hundred dollars, "and interest and attorney's fees," is sufficient to sustain the writ, at least to the extent of five hundred dollars.[141]

138 Hill v. Grigsby, 32 Cal. 55. See Porter v. Brooks, 35 Cal. 199.

139 Cal. Code Civ. Proc., § 538.

140 O'Conor v. Boark, 108 Cal. 173, 41 Pac. 465.

141 Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741.

The affidavit for attachment must contain an unequivocal allegation that the debt is due.[145] It must state the amount of indebtedness over and above all legal set-offs and counterclaims, but it is not absolutely necessary to aver that defendant is a non-resident of the state, where it shows that the debt is unsecured and that the indebtedness is due.[146] A positive statement in the language of the statute is sufficient.[147] An affidavit merely stating that a claim was on contract for the direct payment of money, without stating that the claim was unsecured, is insufficient to justify the issuance of an attachment against a resident of the state.[148]

An affidavit in attachment which states the county, but omits the letters "ss.," is not defective.[149] An affidavit which states the grounds for attachment, that "the defendant has disposed of and concealed, and is about to assign, dispose of, and conceal, his property, with intent to defraud his creditors," is sufficient, and is not bad as being stated conjunctively.[150] If the affidavit is put in the alternative, it is fatally defective, as where it states that the payment of the contract on which the action is brought has not been secured by mortgage upon real or personal property, or, if originally so secured, that such security has become valueless without any act of the plaintiff.[151]

If an affidavit in attachment is defective in not stating all the statute requires, or if it is false, the court has no jurisdiction to issue the attachment.[152] It is the duty of the clerk to issue the writ upon the plaintiff filing an affidavit, stating the ultimate facts in the language of the statute.[153] The clerk performs only a ministerial duty in obedience to a plain statutory mandate.[154]

145 Gatward v. Wheeler, 10 Idaho, 66, 77 Pac. 23.

146 Kerns v. McAulay, 8 Idaho, 558, 69 Pac. 539.

147 Thwing v. Winkler, 13 Okla. 643, 75 Pac. 1126.

148 Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

149 Mercantile Co. v. Glenn, 6 Utah, 139, 21 Pac. 500.

150 Id. See O'Connor v. Roark, 108 Cal. 173, 41 Pac. 465.

151 Winters v. Pearson, 72 Cal. 553, 14 Pac. 304. But see Penniman v. Daniel, 90 N. C. 154.

152 Murphy v. Montandon, 3 Idaho, 325, 35 Am. St. Rep. 279, 29 Pac. 851. See Carlisle v. Gunn, 68 Miss. 243, 8 South. 743; Endel v. Leibrock, 33 Ohio St. 254; Biddle v. Black, 99 Pa. St. 380.

153 Bowers v. London Bank, 3 Utah, 417, 4 Pac. 225.

154 Id.; McCusker v. Walker, 77 Cal. 208, 19 Pac. 382. See, also, Weaver v. Hayward, 41 Cal. 118.

§ 2643. The same—Direct payment of money on contract.—It is not necessary that an affidavit for attachment should state whether the contract for the payment of money is express or implied. An affidavit showing that the defendant is indebted to the plaintiff in a special sum upon a contract for the direct payment of money is sufficient.[155] The same particularity of statement is not required in an affidavit for attachment that is required in a pleading.[156] An affidavit which fails, however, to state definitely the nature of the demand, is defective, though not so defective as to render the proceedings thereunder absolutely void because of the provision of the code permitting the amendment thereof.[157]

The affidavit need not show the proof of the facts which are required by the statute as a basis for the writ.[158] An affidavit which alleges that the plaintiff's demand is on a contract for the direct payment of money, with the further allegation of how the debts accrued, sufficiently states the nature of the demand.[159] An affidavit alleging the contract to be "express or implied" is insufficient.[160]

The fact that an affidavit for an attachment omits to aver that the sum for which the writ is asked is "an actual, *bona fide*, existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the debtor," does not render the attachment issued a nullity as against subsequent attaching creditors.[161] An appeal-bond is a contract for the direct payment of money within the meaning of the statute.[162] So is a bail-bond in a criminal case,[163] and an official bond of a county treasurer.[164] "Direct" implies that the debt must be liquidated.[165]

155 Flagg v. Dare, 107 Cal. 482, 40 Pac. 804. See, also, Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406; Norcross v. Nunan, 61 Cal. 640; Dunn v. Mackey, 80 Cal. 104, 22 Pac. 64; Donnelly v. Strueven, 63 Cal. 182.

156 Bank of California v. Boyd, 86 Cal. 386, 25 Pac. 20; O'Conor v. Roark, 108 Cal. 173, 41 Pac. 465.

157 Leppel v. Beck, 2 Colo. App. 390, 31 Pac. 185.

158 Wheeler v. Farmer, 38 Cal. 215.

159 Bowers v. London Bank, 3 Utah, 417, 4 Pac. 225.

160 Hathaway v. Davis, 33 Cal. 161.

161 Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162.

162 Hathaway v. Davis, 33 Cal. 161.

163 San Francisco v. Brader, 50 Cal. 506.

164 Monterey Co. v. McKee, 51 Cal. 255.

165 Hathaway v. Davis, 33 Cal. 161.

An affidavit for attachment against a non-resident need not state that the payment of the claim is not secured by mortgage, lien, or pledge, or that the claim is upon a contract. That the action is upon a contract, express or implied, need only appear from the complaint in the action.[166] An affidavit to obtain the issue of an attachment under the Code of Civil Procedure need not allege that the defendants have property within the state, nor that the summons has been issued. It is sufficient if the summons is issued when the attachment is obtained, and when both are delivered to the sheriff together.[167] In Ohio, it is settled that where the ground relied on is stated substantially in the language of the statute, and sworn to positively, this is sufficient to authorize the allowance of the attachment by the judge.[168]

§ 2644. **Affidavit, by and before whom made.**—No writ of attachment should issue without an affidavit containing one or more of the prescribed requisites, as set forth in the statute regulating attachment.[169] In the absence of any statutory provisions for the appointment of agents or attorneys for the purpose, any one authorized by the plaintiff to collect, may make the affidavit as one of the incidents of his authority.[170] An affidavit made by the plaintiff's agent, in the form prescribed by statute, sworn to before a notary public, is sufficient, and not open to attack for not disclosing who the plaintiff is, or that the affiant is the agent of the plaintiff.[171] An instrument reciting that plaintiff (a corporation), being sworn, deposes, etc., and signed in the name of plaintiff, "by F., managing agent," is not the affidavit of plaintiff or an agent, which section 2870 of the Revised Statutes of Wyoming requires as the basis for an order for attachment.[172]

It is not a ground for vacating an attachment that the affidavit on which it was obtained was sworn to before a commissioner in another state, and that no certificate of the secretary of state was

166 Kohler v. Agassiz, 99 Cal. 9, 33 Pac. 741.

167 Lawton v. Kiel, 51 Barb. 39.

168 Harrison v. King, 9 Ohio St. 388; Gans v. Thompson, 11 Ohio St. 579.

169 Deering v. Warren, 1 S. Dak. 35, 44 N. W. 1068.

170 Deering v. Warren, 1 S. Dak. 35, 44 N. W. 1068.

171 Robinson v. Hesser, 4 N. Mex. 144 (282), 13 Pac. 204. See, also, Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406.

172 Blyth & Fargo Co. v. Swensen, 7 Wyo. 303, 51 Pac. 873.

obtained, as required by the law of that state. The omission may be supplied.[173]

§ 2645. Affidavit, knowledge, or information.—The affidavit for attachment need not state whether its averments are based upon direct knowledge, or upon information and belief; and if the facts are stated positively, it will be implied that they were within the affiant's knowledge.[174] Where the plaintiff in attachment had written several times to the defendant at his former post-office address, and had received no reply, and the defendant failed to keep an appointment with plaintiff, and he was told that defendant had left the country, he was justified in making an affidavit for attachment stating that defendant was concealing himself to avoid service.[175] Where a creditor takes a bill of sale of goods, but, on being informed by his attorney that it is of no security to him unless he takes the goods into possession, does not take the goods, but allows the debtor to sell them and apply the proceeds as he can spare the money to the payment of the debt, such creditor may afterward sue out an attachment on an affidavit stating that the debt was not secured by any mortgage, lien, or pledge of property, since there has been no acceptance of the bill of sale as a security.[176]

§ 2646. Affidavit, amendments.—A clerical error in naming plaintiff as the affiant in the body of the affidavit, which was signed by his attorney, may be amended.[177] An affidavit in attachment which is merely defective may be amended.[178] An instrument on which an order for attachment is based not being the affidavit of plaintiff or agent, as required by section 2870 of the Revised Statutes of Wyoming, cannot be amended, but the attachment should be discharged.[179] A fatally defective affidavit cannot be amended to meet a motion to discharge the writ.[180] It must conform to the requirements of the statute.[181] Leave to

173 Lawton v. Kiel, 51 Barb. 30.

174 Simpson v. McCarty, 78 Cal. 175, 12 Am. St. Rep. 37, 20 Pac. 406. See Ross v. Steen, 20 Fla. 443; Clowser v. Hall, 80 Va. 864.

175 Brewer v. Mock, 14 Colo. App. 454, 60 Pac. 578.

176 Rodley v. Lyons, 129 Cal. 681, 62 Pac. 313.

177 Dunn v. Drummond, 4 Okla. 461, 51 Pac. 656.

178 Reister v. Land, 14 Okla. 34, 76 Pac. 156.

179 Blyth & Fargo Co. v. Swensen, 7 Wyo. 303, 51 Pac. 873.

180 Pajaro Valley Bank v. Scurich, 7 Cal. App. 732, 95 Pac. 911.

181 Ross v. Gold Ridge Min. Co., 14 Idaho, 687, 95 Pac. 821.

amend the traverse of the attachment affidavit is discretionary, and a traverse in the present tense made subsequent to the time in question does not put in issue the attachment affidavit, and the denial in the answer in the principal suit cannot be relied upon to do so.[182] A mistake in defendant's initials cannot be corrected after the filing of the application, and makes the certificate invalid for attachment.[183] In California, since the amendment of 1909, the writ, affidavit, or undertaking may be amended so as to conform to law, at or before the hearing of an application for a discharge of the attachment.[183a]

§ 2647. **Complaint.**—The amount due, for which an attachment is sought, need not be specified in the complaint.[184] In Utah, where an action is begun on a debt not due, and an attachment is sued out under the provisions of section 3308 of the Compiled Laws of 1888, the complaint must contain, in addition to the allegations of fraud necessary to be made in the affidavit for attachment, a statement of the facts constituting the fraud.[185] The complaint must state facts sufficient for a cause of action.[186]

§ 2648. **Undertaking on attachment.**—Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff in a sum not less than two hundred dollars, and not exceeding the amount claimed by the plaintiff, with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, and that if the attachment is discharged on the ground that the plaintiff was not entitled thereto under section 537 of the California Code of Civil Procedure, the plaintiff will pay all damages sustained by defendant, not exceeding the sum specified in the undertaking. Within five days after actual notice of the levy in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived

182 Midland Fuel Co. v. Schuessler, 18 Colo. App. 386, 71 Pac. 894.

183 McDowell v. Parry, 45 Or. 99, 76 Pac. 1081.

183a Cal. Code Civ. Proc., § 558 as amended 1909.

184 De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

185 Claflin Co. v. Simon, 18 Utah, 153, 55 Pac. 376.

186 Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938. See Bunneman v. Wagner, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 841.

all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify, at the time and place appointed, the clerk or judge must issue an order vacating the writ of attachment.[187]

In the court of the justice of the peace the undertaking on attachment must have two or more sufficient sureties, and be not less than fifty dollars nor more than three hundred dollars.[188] The state or state officers are not required to give undertaking in suits, under the provisions of this act,[189] and this provision applies to the city and county of San Francisco.[190] An undertaking in attachment need not be signed by the plaintiff. The Montana statute is complied with if two sufficient sureties sign the undertaking on behalf of the plaintiff.[191]

§ **2649. Undertaking—Amount.**—Under section 539 of the California Code of Civil Procedure, providing that before issuing a writ of attachment the clerk must require an undertaking in a sum not less than two hundred dollars, and not exceeding the amount of the claim of plaintiff, the fact that the undertaking recites that the claim of plaintiff is five hundred dollars, whereas the complaint prays for five hundred dollars damages, besides one hundred and fifty-three dollars for costs and expenses of plaintiff for keeping certain distrained animals, and further costs at the rate of seventy-six dollars per day, is immaterial, where the undertaking was for the sum of one thousand dollars.[192] Where an honest effort is made to execute a proper undertaking, the law will not concern itself with such a trifle as three days' interest on the claim of plaintiff, but will consider the undertaking as sufficient where it lacks less than three dollars of being equal to the demand of plaintiff.[193] An attachment will not be discharged if at or before the hearing of the application for its discharge the defective writ, affidavit, or undertaking is amended so as to conform to law.[194]

187 Cal. Code Civ. Proc., § 539.
188 Cal. Code Civ. Proc., § 867.
189 Cal. Code Civ. Proc., § 1058.
190 Morgan v. Menzies, 60 Cal. 341.
191 Pierse v. Miles, 5 Mont. 549, 6 Pac. 347.
192 Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600.
193 Aldrich v. Columbia Southern Ry. Co., 39 Or. 263, 64 Pac. 455.
194 Cal. Code Civ. Proc., § 558, as amended 1909.

§ 2650. **Undertaking—sureties.**—On joint and several bonds, each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declares he will not be bound unless the signatures of the others are obtained.[195] Where "sufficient" sureties are required, and there is a general statute providing that where an undertaking is required by law it shall be accompanied by the affidavit of the sureties, to the effect that they are each residents and householders or freeholders within the state, and worth the sum specified in the undertaking, and these facts do not appear from the undertaking, the attachment should be discharged on application for want of sufficient undertaking.[196] Under the Oregon statute [197] permitting surety companies to become sureties on the bond or undertaking of any person or corporation required by law to execute a bond or undertaking, a surety company is a proper surety on an undertaking for an attachment.[198]

§ 2651. **Undertaking, to whom payable.**—It is no objection to an undertaking on attachment that it is made payable to the people of the state of California instead of to the defendant in the suit, as the latter can sue thereon in his own name.[199] A mistake in the recital of the bond as to the amount for which attachment issued may be explained and corrected by parol.[200] Upon a dismissal of the action, the clerk must deliver the bond to the defendant.[201] Merely abbreviating the parties—as "plff." deposes, etc., and calling "deft." the obligee—does not make the bond insufficient.[202]

§ 2652. **Undertaking, cannot be amended.**—An undertaking in attachment which is irregularly issued cannot be amended, under section 473 of the California Code of Civil Procedure, providing for amendments to pleadings or proceedings in furtherance of justice, since section 558 expressly provides that in such cases, on application, the attachment must be discharged.[203] This section was amended in 1909,[204] so that the undertaking,

195 Sacramento v. Dunlap, 14 Cal. 421.

196 Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741.

197 Or. B. & C. Codes, § 3762.

198 Aldrich v. Columbia Southern Ry. Co., 39 Or. 263, 64 Pac. 455.

199 Taaffe v. Rosenthal, 7 Cal. 514.

200 Palmer v. Vance, 13 Cal. 556.

201 Cal. Code Civ. Proc., § 581, subd. 1.

202 Finney v. Moore, 9 Idaho, 284, 74 Pac. 866.

203 Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741.

204 Cal. Stats. 1909, p. 253.

affidavit, or writ may be amended at any time before order of discharge.

§ 2653. Undertaking, when void.—An attachment-bond executed after the writ has been levied and the attachment dismissed is void, as the undertaking should precede the writ and accompany the affidavit.[205] In a suit on a void bond the obligee cannot recover for an injury sustained by the attachment.[206] An undertaking in attachment in which the sureties contract to answer for the wrongful suing out of the attachment is not a sufficient compliance with a statute requiring such undertaking to be conditioned for the payment of all damages that the defendant may sustain, if it is finally decided that the plaintiff was not entitled to the attachment.[207] Where the undertaking given on issuing an attachment from a justice's court was to the effect that plaintiff would pay all costs, etc., and the damages the defendant might sustain by reason of the attachment, "not exceeding one hundred dollars," it was held that the undertaking was bad, and rendered the attachment void, because not issued in substantial conformity with the provisions of the statute, which required an undertaking that plaintiff would pay all damages which defendant might sustain by reason thereof without limitation as to amount.[208]

§ 2654. The writ of attachment.—A writ of attachment is effectual to change the title of personal property only from the time of levy.[209] The lien of an attachment, having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successor.[210] A warrant of attachment issued in a pending action should not be set aside because the warrant, after stating the existence of the cause of action, does not state that the action is pending. If the facts are sufficient, the warrant is not void for omitting to state one of them.[211]

The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within

205 Benedict v. Bray, 2 Cal. 251, 56 Am. Dec. 332; McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

206 Id.

207 Pierse v. Miles, 5 Mont. 549, 6 Pac. 347.

208 Hisler v. Carr, 34 Cal. 641.

209 Taffts v. Manlove, 14 Cal. 47, 73 Am. Dec. 610.

210 Adams v. Woods, 9 Cal. 29.

211 Lawton v. Kiel, 51 Barb. 30.

his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.[212] If the writ is issued from the court of a justice of the peace, it must be directed to the sheriff or a constable of the county in which the justice's court is.[213]

The sheriff of E. county cannot justify the taking of property under a writ of attachment directed to the sheriff of P. county to levy on property of an attachment defendant in that county, and the writ cannot be amended to give that authority.[214]

§ 2655. The writ—Time for issuance.—It is the duty of the clerk of the court to issue the writ upon the filing by the plaintiff of an affidavit, stating the ultimate facts in the language of the statute, together with an undertaking in the amount and forms as defined by statute, and the clerk has no discretionary power.[215] While the clerk is bound to issue writs to the parties respectively, or to their attorneys, when the preliminary papers are filed, he is not bound to deliver the writ into the hands of the party demanding it, if such party is not there to take it, and another plaintiff is seeking a writ against the same defendant. And if the second plaintiff is there, and takes his writ, which is issued second to the sheriff before the other writ is put into the hands of the sheriff, and a priority is thus gained, the clerk is not responsible to the first applicant because the first writ was ready for delivery first, but was not delivered because the plaintiff was not there to take it.[216]

Under section 890 of the Montana Code of Civil Procedure, providing that "plaintiff, at the time of issuing the summons,

212 Cal. Code Civ. Proc., § 540.

213 Cal. Code Civ. Proc., § 868. See, also, Alaska Codes, pt. 4, ch. 14, § 138; Ariz. Civ. Code, par. 341; Idaho Rev. Codes, § 4305; Mont. Rev. Codes, §§ 6657, 6660; Nev. Comp. Laws, § 3221; N. Mex. Comp. Laws, § 2696; Or. B. & C. Codes, § 297; Utah Rev. Stats., § 3069; Wash. Bal. Codes, § 5351; Wyo. Rev. Stats., § 3989.

214 McArthur v. Boynton, 19 Colo. App. 234, 74 Pac. 540.

215 Wheeler v. Farmer, 38 Cal. 215.

216 Lick v. Madden, 25 Cal. 205, 36 Cal. 208, 95 Am. Dec. 175.

or at any time afterwards, may have the property of defendant attached," etc., a writ of attachment issued before the summons is void. Being void, the attachment cannot be given effect by the subsequent issuance of the summons.[217]

§ 2656. The writ—Statement of amount.—Section 538 of the California Code of Civil Procedure requires that the affidavit for an attachment shall set out the amount due, above all set-offs or counterclaims, and section 540 provides that the writ shall contain the amount of plaintiff's claim, which shall be stated in conformity with the complaint, but the writ should issue for the amount stated in the affidavit.[218] A writ ordering attachment of goods to satisfy a debt of eight thousand seven hundred and eighty-two dollars is improper, where the debt amounts to only five thousand dollars, and was so alleged in the affidavit. Where two causes of action are joined in a complaint, and plaintiff is entitled to attachment on only one of them, the amount stated in the writ should be that amount for which plaintiff is entitled to the attachment, and not the amount of both claims.[219]

The writ may state an amount less than that stated in the complaint.[220]

Section 893 of the Montana Code of Civil Procedure requires an attachment writ to state the amount of plaintiff's demand, in conformity with the complaint. Where the writ contains the amount of each of the separate causes of action pleaded, based on an affidavit not stating a cause of attachment as to all, it is not invalid because it alleges the amount demanded as the aggregate of all the claims.[221] The writ is not void because the clerk of the court inserts therein one hundred dollars as the probable costs, instead of fifty dollars, as provided by statute, and the writ may be amended in this respect.[222] Where the writ states the amount of damage and costs, in one amount, equal to that enumerated in the complaint, it conforms with the complaint in amount.[223]

217 Sharman v. Huot, and Eukes v. Huot, 20 Mont. 555, 63 Am. St. Rep. 645, 52 Pac. 558; Ridenbaugh v. Sandlin, 14 Idaho, 472, 125 Am. St. Rep. 175, 94 Pac. 827.

218 De Leonis v. Etchepare, 120 Cal. 407, 52 Pac. 718.

219 Baldwin v. Napa etc. Wine Co., 137 Cal. 646, 70 Pac. 732.

220 Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653; Tibbet v. Sue, 122 Cal. 206, 54 Pac. 741.

221 Wilson v. Barbour, 21 Mont. 176, 53 Pac. 315.

222 Emerson v. Thatcher, 6 Kan. App. 325, 51 Pac. 50.

223 Wigmore v. Buell, 122 Cal. 144, 54 Pac. 600.

§ 2657. The writ—Waiver of defects.—Where defendant died before service of the writ, and his executrix appeared and made answer in the principal suit, after her motion to quash the attachment was overruled, her general appearance did not cure the omission of complete service of the writ on her intestate.[224] Where the writ is in due form and properly served, failure of the probate judge to docket it does not affect the lien.[225]

§ 2658. Service of writ.—Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.[226] No parol instructions of the plaintiff in an attachment or execution respecting property seized by the sheriff under either writ will discharge such sheriff from liability. The statute is express that such instruction must be in writing;[227] since the proceeding by attachment is in derogation of the common law, the service of the writ must be in conformity to the statute authorizing it to make the judgment valid.[228] Attachments are governed by the same rules as executions with respect to liability of officers and parties levying and causing to be levied.[229] Likewise, they effect no lien as against *bona fide* purchasers before actual service or levy.[230]

§ 2659. Service on a corporation.—An attachment of credits in the hands of a corporation may be served by notice to their clerk.[231] But under subdivision 5 of section 542 of the California Code of Civil Procedure, service to be made on the "agent" of a

224 Thompson v. White, 25 Colo. 226, 54 Pac. 718.

225 First National Bank v. Hesser, 14 Okla. 115, 77 Pac. 36.

226 Cal. Code Civ. Proc., § 543. See, also, Alaska Codes, pt. 4, ch. 14, § 140; Idaho Rev. Codes, §§ 4302-4310, n.; Mont. Rev. Codes, § 6661; Nev. Comp. Laws, § 3223; N. Mex. Comp. Laws, § 2700; Or. B. & C. Codes, § 301; Utah Rev. Stats., §§ 3073-3075; Wash. Bal. Codes, § 5362; Wyo. Rev. Stats., § 3997.

227 Sanford v. Boring, 12 Cal. 539.

228 James v. Jenkins, Hempst. 189, Fed. Cas. No. 7181a.

229 Gilbert v. Rounds, 14 How. Pr. 46; Burgess v. Atkins, 5 Blackf. (Ind.) 337; Shaver v. White, 6 Munf. (Va.) 110, 8 Am. Dec. 730; Goll v. Hinton, 8 Abb. Pr. 120.

230 Kuhlman v. Orser, 5 Duer, 242.

231 Davidson v. Donovan, 4 Cranch C. C. 578, Fed. Cas. No. 3603.

corporation must be made on the "managing agent," as required in subdivision 4 of the same section. At common law, service on a corporation must be made on the president or principal officer.[232]

§ 2660. Service on personal property.—Personal property capable of manual delivery must be attached by taking it into custody.[233] A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt.[234] If the articles are bulky and difficult of removal, it may be necessary to remove them, and the officer must do whatever is necessary to reduce the property to his possession and subject to his dominion and control.[235]

An officer has no right to take mortgaged personalty under process against the mortgagor, unless he first pays or tenders to the mortgagee, or deposits for him, the amount of his mortgage debt.[236]

§ 2661. Service on growing crops.—As amended in 1903, the California provision for attaching growing crops reads as follows: " . . . in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property."[237]

§ 2662. Service on debts and credits, etc.—"Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and

232 Kennedy v. Hibernia Sav. etc. Society, 38 Cal. 151.

233 Cal. Code Civ Proc., § 542, subd. 3.

234 Sanford v. Boring, 12 Cal. 539. See, also, Rix v. Silknitter, 57 Iowa, 262, 10 N. W. 653; Russell v. Major, 29 Mo. App. 167; Lyeth v. Griffis, 44 Kan. 159, 24 Pac. 59; Joseph v. Henderson, 95 Ala. 213, 10 South. 843.

235 Crisman v. Dorsey, 12 Colo. 567, 21 Pac. 920, 4 L. R. A. 664. As to goods in warehouse, see Sinsheimer v. Whitely, 111 Cal. 378, 52 Am. St. Rep. 192, 43 Pac. 1109.

236 Berson v. Nunan, 63 Cal. 550; Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601.

237 Cal. Code Civ. Proc., § 542, subd. 5. Earlier cases are, Raventas v. Green, 57 Cal. 254; Sheehy v. Graves, 58 Cal. 449; Rudolph v. Saunders, 111 Cal. 233, 43 Pac. 619.

other personal property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ," except in case of growing crops, when it must be recorded.[238] The service on defendant, in an action to recover money, of a writ of attachment, in another suit by a third party against the plaintiff, cannot be pleaded by the defendant in bar of a recovery. It merely suspends the proceedings until the determination of the suit in which the attachment is issued.[239]

Where an officer has levied upon goods under an attachment, and possession has been obtained by another under the terms of a delivery-bond, which requires the return of them to the officer, if so adjudged by court, the goods are *in custodia legis,* and cannot be levied upon by another officer pending the litigation of the case in which the original attachment was issued.[240]

§ 2663. **Service on real estate.**—"Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached." If the property stands in the name of another, the same notice must be given except that the fact of defendant's interest and the attachment of that interest must be set out, and a copy must be served upon the one in whose name the property stands, or his agent, if within the county.[241] The statute does not provide that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained.[242] Nor is it necessary, when a levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied.[243] Formerly the deposit in the recorder's office of a

238 Cal. Code Civ. Proc., § 542, subd. 5.

239 Pierson v. McCahill, 21 Cal. 122.

240 Eidson v. Woolery, 10 Wash. 225, 38 Pac. 1025.

241 Cal. Code Civ. Proc., § 542, subds. 1, 2.

242 Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775.

243 Id.; O'Connor v. Blake, 29 Cal. 312.

copy of the writ, with a description of the property attached, was sufficient, but not so now; for a notice that it is attached must be filed with the other.[244]

The attachment lien does not become valid, and no jurisdiction to order a sale of the property exists, until the writ is properly served by filing a copy with the recorder and by delivering a copy to defendant, or the equivalent of such service.[244a] The notice of the levy of attachment required to be filed must identify the property so that a purchaser can tell from the notice itself what property he is buying.[245] Under section 4307 (subd. 3) of the Revised Statutes of Idaho, requiring copies of the writ, description of the property, and notice of levy to be served on the occupant, if there be one, and, if there be none, the posting of such copies in a conspicuous place on the land levied upon, it is not sufficient to serve such copies on the owner, who is not an occupant of the land.[246] Under a law providing that a range levy in attachment may be made in the presence of two persons, and notice thereof given in writing to the owner, and a copy of such notice attached to a copy of the writ filed with the county recorder, such a levy creates no lien as against a subsequent mortgagee where the copy of the notice is not filed with the recorder.[247] After the sheriff has levied on real estate and made return, he has no authority to take a bond and release the levy.[248]

§ 2664. Notice of the levy.—Several separate and distinct tracts of land cannot be attached by posting a certified copy of the writ in a conspicuous place on one only of such tracts.[249] Where vacant property belonging to a non-resident was conveyed by a trust-deed, void on its face, the property was properly attached without serving or mailing notice of the attachment to the grantee in the trust-deed.[250]

244 Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775; Main v. Tappener, 43 Cal. 209.

244a Thompson v. White, 25 Colo. 226, 54 Pac. 718.

245 First Nat. Bank v. Sonneliter, 6 Idaho, 21, 51 Pac. 993.

246 Williams v. Olden, 7 Idaho, 146, 97 Am. St. Rep. 250, 61 Pac. 517.

247 Steinfeld v. Menager, 6 Ariz. 141, 53 Pac. 495.

248 Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156.

249 Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803, 23 Pac. 887. See Raynolds v. Ray, 12 Colo. 108, 20 Pac. 4; Davis v. Baker, 88 Cal. 106, 25 Pac. 1108, 72 Cal. 494, 14 Pac. 102.

250 Johnson v. Miner, 144 Cal. 785, 78 Pac. 240.

It is immaterial that the notice of levy on real estate is served on the owners the day before the levy; and where the land was devised by will the fact that the notice of levy described the holders as "heirs and legatees" does not make it insufficient.[251] A mortgagee who intervenes in an action of attachment is entitled to notice of all subsequent proceedings.[252]

§ 2665. **Custody of the property attached.**—An officer attaching goods is entitled, without liability to the debtor, to have possession of the building containing the goods for a reasonable time.[253] Where the property is portable and of great value, it is proper to allow keeper's fees for preserving the property.[254] The sheriff may recover of plaintiff in attachment the expenses of preserving the property; and if payment of the proceeds of the goods to the plaintiff is a prerequisite, such payment may be made by note given by the sheriff.[255]

A sheriff appointing a person as his custodian of carriages that had been previously in the latter's possession, in his carriage-shop, together with a large number of other carriages, without ever separating the carriages or taking possession of them distinct from that of the appointed custodian, does not make a levy under section 104 of the code, providing that personal property capable of manual delivery shall be attached by taking it into custody.[256] In order to proceed under the range-levy act,[257] providing that where it is impossible for the sheriff, in levying an attachment on range cattle, to round them up without including cattle belonging to other owners, he shall round up such as he can, and as to the balance he may file a certified copy of the writ with the clerk of the probate court of the county in which the brand of such stock is recorded, it is necessary that some substantial number of cattle belonging to other owners be actually rounded up and gathered before the plaintiff can avail himself of said act.[258] Failure of the under-sheriff to participate

251 Kilham v. Western Bank etc. Co., 30 Colo. 365, 70 Pac. 409.

252 Perkins v. Bailey, 38 Wash. 46, 107 Am. St. Rep. 831, 80 Pac. 177.

253 Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711.

254 Nisbet v. Clio Min. Co., 2 Cal. App. 436, 83 Pac. 1077.

255 Southwestern Commercial Co. v. Owesney, 10 Ariz. 49, 85 Pac. 724.

256 Gottlieb v. Barton, 13 Colo. App. 147, 57 Pac. 754.

257 Laws N. Mex. 1889 ch. 54.

258 Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306.

with the appraisers in the appraisement of the property is not such an omission in the service of the writ as required the court to quash the writ or set aside the levy as to all the property.[259]

§ 2666. Sale of perishable property.—If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution.[260] No order of sale is required to authorize a sale by the officer.[261] But in Idaho a sheriff has no right to assume to sell attached property as perishable without an order of court, which order must be predicated upon a sworn statement by the sheriff showing the character of the property claimed to be perishable and the amount thereof.[262] If the property is not subject to speedy decay, it cannot be sold by the sheriff without an order of court.[263]

§ 2667. Diligence of sheriff.—It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence.[264] Where one writ was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the latter writ was served before the first one, at one o'clock Monday morning, the sheriff was not necessarily guilty of negligence. Reasonable diligence in the execution depends upon the particular facts, whether, for instance, the writ be for fraud, or because the defendant is about to leave the state or remove his property, and the like. The mere omission of a deputy to inform the sheriff of having a process in hand is not such negligence as to charge the sheriff in case a writ last in hand was executed first.[265]

§ 2668. Presumption of regularity.—Where a substitute sheriff (elisor) was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified, it was held that the appointment being made by a

259 Emerson v. Thatcher, 6 Kan. App. 325, 51 Pac. 50.

260 Cal. Code Civ. Proc., § 547.

261 Low v. Henry, 9 Cal. 551.

262 Work v. Kinney, 5 Idaho, 716, 51 Pac. 745.

263 Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

264 Wheaton v. Neville, 19 Cal. 41.

265 Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

judge having competent jurisdiction, the presumption of the law is that he faithfully performed his duty.[266] The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient, *prima facie*, to show a due and proper execution of the writ.[267]

§ 2669. **Diligence governs the equities.**—In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger to an action in which it occurs.[268] Where there are several attachments, the one first served on the garnishee binds the effects in his hands, although the marshal has prior attachments in his hands at the time of such service.[269]

§ 2670. **Beginning of the lien.**—The lien of attachment of real property is not perfected until both the acts described by statute—to-wit, delivery to the occupant of a copy of the writ, or posting a copy upon the premises, if there be no occupant, and the filing of a copy with the recorder, together with a description of the property attached, and the notice thereof—are performed. The omission of either act is fatal to the creation of the lien.[270] The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment and the deposit of the copy of the writ, together with a description of the land attached, with the county recorder. And such a lien cannot be divested by the failure of the sheriff to make a proper return of the writ.[271]

The lien of attachment depends upon the date of filing of the certificate, and a mere clerical error in copying it into the records will not defeat the lien.[272] A judgment for plaintiff on attachment becomes, when docketed, a lien on all of defendant's real estate, but does not establish any special interest in the land,

266 Turner v. Billagram, 2 Cal. 520.

267 Ritter v. Scannell, 11 Cal. 248, 70 Am. Dec. 775.

268 Dixey v. Pollock, 8 Cal. 570.

269 McCobb v. Tyler, 2 Cranch C. C. 199, Fed. Cas. No. 8705; Johnson v. Griffith, 2 Cranch, 199, Fed. Cas. No. 7386. But compare Violette v. Tyler, 2 Cranch C. C. 200, Fed. Cas. No. 16955; Grigsby v. Love, 2 Cranch C. C. 413, Fed. Cas. No. 5827.

270 Wheaton v. Neville, 19 Cal. 41; Schwartz v. Cowell, 71 Cal. 306, 12 Pac. 252.

271 Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775.

272 Schlosser v. Beemer, 40 Or. 412, 67 Pac. 299.

and the right acquired by seizure becomes merged in the judgment lien.[273] The attachment begins by filing the petition in the clerk's office and the issuance of summons.[274]

§ 2671. General effect of the lien.—The attachment of sufficient personal property to satisfy a claim does not affect the judgment afterwards obtained by the creditor so as to prevent his satisfying out of real estate attached at the same time as the personalty, as against a creditor taking a mortgage on the real estate subsequently.[275] The purpose of an attachment is to hold the property of the defendant as security for such judgment as may be rendered.[276] When the judgment is rendered and becomes a lien upon the property attached, the lien of the attachment becomes merged in that of the judgment, and the only effect thereafter of the attachment lien upon the property is to preserve the priority acquired by attachment.[277] This is confined to real property, as the judgment does not constitute a lien upon the personal property; the prior attachment becomes a lien in the nature of a legal estate vested in the sheriff for the benefit of the creditor.[278]

An attachment creditor is not entitled to rents of the property levied upon before the sale and before the time for redemption has expired, though such rents are in the hands of an assignee for the benefit of creditors, and such assignment has been decreed to be fraudulent as to such attaching creditors.[279] In absence of intervening rights of third parties, a lien against property seized under attachment may be decreed for the amount of the judgment recovered against a defendant personally served, though it exceeds the sum for which the writ was issued.[280] Where a non-resident is sued by an attachment, the entry of judgment does not make a lien on property other than that attached.[281]

273 Oliver v. Wright, 47 Or. 322, 83 Pac. 870.

274 Kan. Code Civ. Proc., § 57; Wester v. Long, 63 Kan. 876, 66 Pac. 1032.

275 Dickson v. Back, 32 Or. 217, 51 Pac. 727.

276 Cal. Code Civ. Proc., § 537.

277 Bagley v. Ward, 37 Cal. 131, 99 Am. Dec. 256; Rhodes v. McGarry, 19 Or. 222, 23 Pac. 971.

278 Patrick v. Montader, 13 Cal. 444.

279 McLaughlin v. Park City Bank, 22 Utah, 473, 63 Pac. 589, 54 L. R. A. 343.

280 Glendale Fruit Co. v. Hirst, 6 Ariz. 428, 59 Pac. 103.

281 Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617; Kerns v. McAulay, 8 Idaho, 558, 69 Pac. 539.

§ 2672. **Priority between attachments.**—A junior attaching creditor cannot take advantage of irregularities in the affidavit or bond given by a prior attaching creditor of a common debtor.[282] Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his on the grounds that his superior diligence disclosed the fraud.[283] Where a petition in attachment was amended so as to include another partner in the suit, the amendment related back to the filing of the original petition, and hence the attachment of other creditors levied between the filing of the original and of the amended petition did not become prior liens.[284] Also, an amendment to an affidavit in attachment stating the amount of the indebtedness relates back to the time of the filing of the original affidavit, and the lien of the writ issued thereon is prior to that of a junior attachment levied before such amendment was made.[285]

Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who sold the goods and paid the proceeds to the first attaching creditor, and afterwards the third party got judgment against the sheriff for the value of the property, recourse must be had against the first attaching creditor, for whose benefit the property was sold. The sheriff was a separate agent for both of them, and they were not joint trespassers; and as the sheriff disposed of the property for the benefit of the first creditor, that is the one to whom he must look for indemnity.[286] It is the duty of the sheriff to apply the money in the order of the attachments, and he cannot go back of the process and raise any question of validity.[287]

§ 2673. **Attachment versus mortgage liens.**—The lien of a mortgagor who is absent is superior to an attachment lien.[288] Where the rights of a mortgagee of personal property have been

282 Fridenberg v. Pierson, 18 Cal. 152, 79 Am. Dec. 162.

283 Patrick v. Montader, 13 Cal. 444.

284 Symms Grocer Co. v. Burnham, 6 Okla. 618, 52 Pac. 918.

285 Coyle Mercantile Co. v. Nix, 7 Okla. 267, 54 Pac. 469.

286 Davidson v. Dallas, 8 Cal. 227.

287 McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

288 Perkins v. Bailey, 38 Wash. 46, 107 Am. St. Rep. 831, 80 Pac. 177.

interfered with by attachment, he has a right to interplead. Any person claiming property attached may interplead, and the interpleader need not give bond.[289] Before mortgaged personal property is taken under an attachment or execution, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee, and when the property is sold under process the first money must be applied to the repayment of the sum paid to the mortgagee, with interest from the date of such payment.[290]

Under a statute requiring notice to the owner of a range levy in attachment, and a filing with the recorder of a copy of the notice attached to the copy of the writ, such a levy created no lien as against a subsequent mortgagee whose mortgage was filed before the requirements of the statute were complied with.[291] Where executors loaned money to an estate on a trust-deed, and it was afterwards foreclosed and bought in by one of the executors, as executor, his creditors may assume that he bought the property individually, and attach it, if nothing appears of record to notify them of the true state of title.[292]

§ 2674. **Attachment versus labor and material liens.**—Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process to enforce any debt due by the purchaser of such materials, except a debt due for the purchase price thereof, so long as in good faith the same are about to be applied to the construction, etc., of the building, mining claim, or other improvement.[293] In cases of executions, attachments, and writs of similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, laborers, etc., who render service, and who have claims against the defendant for labor done, may file a verified statement of their claim therefor, with the officer executing the writ, and give copies thereof to the debtor and the creditor, at any time before the actual sale of the property levied upon, or, in event of a

289 Miller v. Campbell etc. Co., 13 Okla. 75, 74 Pac. 507.

290 Cal. Civ. Code, §§ 2968-2970.

291 Menager v. Farrell, 6 Ariz. 316, 57 Pac. 607.

292 Perkins v. Adams, 16 Colo. App. 96, 63 Pac. 792.

293 Cal. Code Civ. Proc., § 1196.

levy upon money, at any time before the transfer of such money under execution; and if the claim be undisputed by the defendant or a creditor, such officer must pay to such persons, out of the proceeds of the sale, the amount each is entitled to for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars.[294] But this section does not give the labor claimant a lien on the attached property; nor can such claimant sue in equity to restrain the dismissal of the attachment in which he has intervened, since he has a proper remedy at law.[295]

A suit to establish a claim for services rendered, in so far as it attempts to enforce a preferred lien on attached property, is equitable in nature, and not within the jurisdiction of the justice of the peace court. Also, where the holder of an alleged preferred claim for labor failed to bring his suit within ten days after notice of dispute of his claim, as required by sections 2153 and 2154 of the Code of Civil Procedure, he waived his right to a lien on the attached property as against attaching creditors.[296]

§ 2675. **Attachment versus other claims.**—An attaching creditor is entitled, by reason of his attachment, to the same rights as a purchaser from the debtor, and is charged only with such notice as the record imports.[297] A title acquired by sale under attachment will not necessarily prevail over a prior unrecorded deed.[298] A purchaser of land with notice of an attachment lien takes subject to that lien.[299] The statutory provision that on attachment, other creditors shall share *pro rata* with the attachment creditor does not apply to the justice of the peace court.[300] Plaintiff in attachment is not deemed a purchaser in good faith as against an outstanding equity.[301]

§ 2676. **Partnership creditor's lien.**—Where one partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts just as before

294 Cal. Code Civ. Proc., § 1206.

295 Winrod v. Wolters, 141 Cal. 399, 74 Pac. 1037.

296 Shea v. Regan, 29 Mont. 308, 74 Pac. 737.

297 Security Savings etc. Co. v. Loewenberg, 38 Ore. 159, 62 Pac. 647.

298 Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

299 Stillman v. Hamer, 70 Kan. 469, 109 Am. St. Rep. 465, 78 Pac. 836.

300 Kimball v. Raymond, 9 Idaho, 176, 72 Pac. 957.

301 Flegel v. Chas. Koss & Bros. Co., 47 Or. 366, 83 Pac. 847.

the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner, though the latter attach the goods first. A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution.[302] Where G. conceals his insolvency and obtains an extension from his creditor, B., and before the maturity of the note B., becoming alarmed for fear other creditors would exhaust the property of G. by attachment, secured from G. an antedated note for the amount due him at the date thereof, and brought immediate suit thereon, by an attachment, B.'s attachment and claim were valid against the subsequent attaching creditors, the case not being one either of actual or constructive fraud.[303]

§ 2677. **Individual creditor's lien.**—A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. Neither by his attachment nor by the agreement did the separate creditor acquire any title to or lien upon the property as against the superior equity of a subsequent attaching creditor of the firm.[304] The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of a receiver by the court, does not prevent a creditor from proceeding by attachment and gaining a priority over other creditors, until a final decree of dissolution and order of distribution.[305] Mere possession by a joint owner of personalty does not entitle him to a return of the property taken in attachment against the interest of the other owner, such possession being that of the co-owner, and the officer having a right to levy on the entire property to enforce a claim against the co-owner.[306]

§ 2678. **Conflict of laws.**—Where the debtor and creditors are all residents and citizens of New York, and the debtor owns

302 Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605.

303 Brewster v. Bours, 8 Cal. 501.

304 Burpee v. Bunn, 22 Cal. 194.

305 Adams v. Woods, 9 Cal. 24.

306 Sharp v. Johnson, 38 Or. 246, 84 Am. St. Rep. 788, 63 Pac. 485.

property in Illinois which he mortgages to one of the creditors, but which is attached by the other creditor before the mortgage is recorded or the goods taken into possession, the attachment stands superior to the unrecorded or after-recorded mortgage; and the judgment in the attachment suit is a bar to an action between the two creditors in a suit over the proceeds of the property brought in New York.[307]

§ 2679. **Life of the lien.**—In the absence of a statutory provision, the duration of an attachment lien affirmed by judgment is the duration of the judgment itself, and before the lien can be deemed abandoned by the plaintiff some affirmative act to that effect must be shown.[308] The California legislature of 1909 fixed the period for which an attachment continues to be a lien upon real estate at three years, unless sooner released or discharged, and provided for extensions of the lien for periods of two years, upon motion of a party, made between five and sixty days prior to the expiration of the lien, and the filing of a certified copy of the order in the office of county recorder of the county wherein the land is situated.[309] In Oregon, the lien continues after judgment until the debt is paid and sale under execution is issued on the judgment, or until the judgment is satisfied or the attachment vacated; and plaintiff's failure to properly enter his judgment subsequently recovered in the judgment lien docket does not operate as a waiver of the attachment lien.[310] An appeal from a judgment for the defendant in an attachment continues the attachment in force pending the appeal, providing the undertaking required by statute is given.[311]

An attachment lien is waived by a failure to enter an order for the sale of the goods on entry of judgment.[312] In Colorado and California, attached property released by defendant giving bond is not released from the lien of the attachment, and may be retaken on a recovery of a judgment, even from one who has bought it in good faith.[313] In Arizona, under the revised statutes, real estate attached before the owner's death is not subject to

307 Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109.

308 Stillman v. Hamer, 70 Kan. 469, 109 Am. St. Rep. 465, 78 Pac. 836.

309 Cal. Code Civ. Proc., § 542a.

310 Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617.

311 Primm v. Superior Court, 3 Cal. App., 208, 84 Pac. 786.

312 Moore, Schafer Shoe Mfg. Co. v. Billings, 46 Or. 401, 80 Pac. 422.

313 Chittenden v. Nichols, 31 Colo. 202, 72 Pac. 53.

sale under the attachment after his death, the claim not being waived as to other property, but it is a prior claim against the land, if sold.[314]

§ 2680. **Irregular process.**—Where an attachment was issued on a complaint, which was a printed form, with the blanks filled up by the clerk, at the request of the plaintiff, but no name signed to it till next day, and after other attachments on the same property, when it was signed by the clerk, with the name of plaintiff's attorney, it was held that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void.[315] The issue of an attachment, and the levy of the same on goods, if there is a legal cause of action, is not such a duress of goods as to give a cause of action for damages in favor of one whose goods are seized.[316] An attachment regular upon its face is not void because the complaint does not set up a cause of action which warrants the issuance of an attachment.[317]

The fact that a judgment in an action aided by attachment was not docketed does not invalidate the lien of the attachment, inasmuch as an attachment lien is not merged in the judgment until the judgment becomes a lien.[318] The fact that the sheriff's return to the writ of execution issued on the judgment was not filed within sixty days did not destroy the lien created by a levy of an attachment.[319]

§ 2681. **Return, time of.**—Writs of attachment are not, technically speaking, returnable to any term of court,[320] but the sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto. Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner.[321] The fact that the sheriff's return to the writ

314 Wartman v. Pecka, 8 Ariz. 8, 68 Pac. 534.

315 Dixey v. Pollock, 8 Cal. 570.

316 Kohler v. Wells, 26 Cal. 606.

317 McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

318 Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254.

319 Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

320 Brady v. Farwell, 8 Colo. 97, 5 Pac. 808.

321 Cal. Code Civ. Proc., § 559.

of execution issued on the judgment was not filed within sixty days did not destroy the lien created by a levy of an attachment.[322]

§ 2682. **Return—What to contain.**—A return to an attachment of real property may describe the property by reference to the inventory and appraisement,[323] and it need not state that the property attached was that of defendant.[324] The mere omission of a return to an attachment to state in words that a copy was served is an irregularity only, if it otherwise appear that an attachment has been levied;[325] and the failure of the return to state the name of the occupant of the land does not render void a judgment sale of the land.[326] The omission of the return to state whether a copy of the order was left with an occupant is an irregularity not available to a purchaser in a collateral attack.[327]

Where a return states that the officer attached real estate by "posting" a copy of the writ in a conspicuous place thereon, it sufficiently shows, as against collateral attack of a judgment, the "leaving" of a copy in such place;[328] and also, where the return shows that there was "no occupant thereof on the premises" when the writ was served, it will not be construed as a statement that the premises were actually occupied, but that the occupant was temporarily absent at the time of the officer's visit.[329]

The return of an officer on a writ of attachment on potatoes is not conclusive as to the number of potatoes attached.[330] Where the return is regular in form, and the property is held, the burden is on the debtor, on motion to quash, to show that the writ was not served as stated in the return.[331]

322 Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 184, 61 Pac. 3.

323 Wagstaff v. Moser, 8 Kan. App. 855, 55 Pac. 554.

324 Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

325 Wagstaff v. Moser, 8 Kan. App. 855, 55 Pac. 554.

326 White v. Ladd, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739.

327 Stillman v. Hamer, 70 Kan. 469, 109 Am. St. Rep. 465, 78 Pac. 836.

328 Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359.

329 Id.

330 La Follett v. Mitchell, 42 Or. 465, 95 Am. St. Rep. 780, 69 Pac. 916.

331 Lewis v. Rasp, 14 Okla. 69, 76 Pac. 142.

§ 2683. Amendment of the return.—The return cannot be amended where a third party has acquired an interest adverse to the attachment,[332] but a mistake in the date of a sheriff's return may be amended at any time.[333] The regularity of a levy is sufficiently shown, as against a collateral attack, by the return of the attaching officer reciting that he had duly levied the attachment upon all the right, title, and interest of the defendant in and to certain described real estate.[334]

Where it appears that the notice of attachment upon realty filed with the clerk and recorder is correct, it is not error, on application supported by affidavits, and notice to opposing counsel, to allow the sheriff to amend his return by correcting a misdescription of the realty attached.[335]

§ 2684. Conclusiveness of the return.—The sheriff's return is conclusive against the plaintiff, and his action must be for a false return.[336] Where a writ of attachment was issued on the 26th of August, and a copy delivered to the occupant of the premises, or posted upon them, on the 29th of that month, and on the same day the writ was returned, with a certificate of the sheriff's proceedings, and filed in the clerk's office, but no copy of the writ with a description of the property was filed with the recorder until the 9th of September following, it was held that after the return of the writ to the clerk's office on the 29th of August the sheriff had no authority to take any proceedings for the completion of the attachment previously omitted; that the writ was authority to him only for acts performed while it remained in his possession; and hence, that another creditor of the debtor purchasing the property from the latter on the 6th of September took it free from any lien of the attachment.[337]

§ 2685. Return under second attachment.—Where an officer, by virtue of a second attachment, levies on property already in his possession by virtue of a former attachment, it is only neces-

332 Newhall v. Provost, 6 Cal. 85; Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287.

333 Ritter v. Scannell, 11 Cal. 238, 70 Am. Dec. 775.

334 Anderson v. Goff, 72 Cal. 65, 1 Am. St. Rep. 34, 13 Pac. 73.

335 McClure v. Smith, 14 Colo. 297, 23 Pac. 786. For insufficient returns, see Hall v. Stevenson, 19 Or. 153, 20 Am. St. Rep. 803, 23 Pac. 887; Hodgman v. Barker, 14 N. Y. Supp. 574. For sufficient returns, see Davis v. Baker, 72 Cal. 494, 14 Pac. 102.

336 Egery v. Buchanan, 5 Cal. 53.

337 Wheaton v. Neville, 19 Cal. 41.

sary for him to return that he has attached the interest of the defendant in the property then in his possession.[338]

§ 2686. **To release attached property by giving bond.**—"Whenever the defendant has appeared in the action he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing from the operation of the attachment any or all of the property attached." The plaintiff may require the sureties to justify.[339]

§ 2687. **Notice of motion to release attached property.**—The defendant must have appeared in the action in order to give the notice and make a motion to release the property from the attachment.[340] The number of days' notice to be given is governed by the general section as to notice,—viz. section 1005 of the California Code of Civil Procedure. But it must be made within the time in which defendant must appear and answer the summons.[341]

§ 2688. **Undertaking of defendant to release attached property.**—The court or judge may fix the amount of the undertaking, and, if necessary to know the value of the property released, it may be appraised. There must be at least two sureties, who are residents and freeholders or householders, and plaintiff may require them to justify before the property can be released. The undertaking must be either to return the property released or to pay its value, not exceeding the amount of the judgment, in case the plaintiff recover judgment in the action.[342]

A common-law bond in form, upon the prescribed statutory conditions, given to a sheriff to procure a discharge of goods attached, is a sufficient compliance with the provisions of the statute.[343] A bond or undertaking, as either may be prescribed by statute to be given to secure the release of property attached, is designed to serve the same purpose and to stand upon the

338 O'Connor v. Blake, 29 Cal. 312.
339 Cal. Code Civ. Proc., § 554.
340 Id.
341 Wallace v. Lewis, 9 Mont. 399, 24 Pac. 22.
342 Cal. Code Civ. Proc., § 555.
343 Curiac v. Packard, 29 Cal. 194.

same consideration, and, when an action is brought upon either, is governed by like principles.[344]

§ 2689. **Effect of releasing the property.**—After the filing of a bond to discharge an attachment under section 5374 of the Washington code, defendant cannot raise the question of the regularity of the attachment under section 5376, and such bond is an unconditional promise to pay the judgment that may be rendered against defendant in that action, regardless of the regularity of the attachment; for the filing of the bond itself discharges the attachment, and a subsequent order to that effect is a nullity.[345] The giving of an undertaking to procure the discharge of an attachment not only releases the levy, but also destroys the writ itself.[346] But in Colorado and California, it seems that giving a bond does not release the property from the lien, and that it can be retaken on the recovery of a judgment for the plaintiff, even from a subsequent purchaser in good faith.[347] Where the release works a destruction of the lien, a motion to dissolve the attachment, as being irregular or improvidently issued, cannot be entertained.[348]

§ 2690. **To discharge the attachment.**—"The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued."[349] A statement in the language of the above statute is not sufficient, for the reason that the particular points of irregularity upon which the motion is made must be set out.[350] The writ will be dissolved for setting up an amount in excess of the affidavit.[351] Failure

344 Low v. Adams, 6 Cal. 277.

345 Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004.

346 Fox v. McKenzie, 1 N. Dak. 298, 47 N. W. 386. See McCombs v. Allen, 82 N. Y. 114; Bunneman v. Wagner, 16 Or. 433, 8 Am. St. Rep. 306, 18 Pac. 841; Hill v. Harding, 93 Ill 77; Myers v. Smith, 29 Ohio St. 123. Compare Kohn v. Hinshaw, 17 Or. 308, 20 Pac. 629; Drake v. Sworts, 24 Or. 198, 33 Pac. 563.

347 Chittenden v. Nichols, 31 Colo. 202, 72 Pac. 53; Low v. Adams, 6 Cal. 277; Curiac v. Packard, 29 Cal. 194.

348 Fox v. McKenzie, 1 N. Dak. 298, 47 N. W. 386.

349 Cal. Code Civ. Proc., § 556.

350 Freeborn v. Glazer, 10 Cal. 337.

351 Finch v. McVean, 6 Cal. App. 272, 91 Pac. 1019.

of the complaint to state a cause of action is ground for dissolving the writ.[352]

§ 2691. **Motion on affidavit.**—If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made.[353] When the motion to dissolve is called, the court may allow defendant to file an affidavit denying the allegations of the attachment affidavit, and then the burden is on the plaintiff to prove his affidavit; but when defendant introduces his evidence, he waives any error of the court in not dismissing the attachment for want of evidence by the plaintiff.[354]

§ 2692. **Time for the motion.**—A motion to discharge an attachment is too late if made after the expiration of the time to answer, and calling it a "substituted motion" will not help it.[355] The motion must be made within the time in which the defendant shall appear and answer the summons.[356] This was formerly the rule in California,[357] but from the amended code it seems that the motion may be made at any time, either before or after the release of the attached property.[358] In Kansas, Nebraska, and Wyoming, the motion may be made at any time before judgment, on giving reasonable notice to the adverse party.[359]

§ 2693. **Notice of motion.**—A notice of motion to discharge a writ of attachment, "because the said writ was improperly issued," is insufficient, for the reason that it should specify the grounds of the motion, and wherein it will be urged that the writ was improperly issued.[360] If the prescribed procedure for

352 Ross v. Gold Ridge Min. Co., 14 Idaho, 687, 95 Pac. 821; Pinkiert v. Kornblum, 5 Cal. App. 522, 90 Pac. 969.

353 Cal. Code Civ. Proc., § 557.

354 Dunn v. Launch, 13 Okla. 577, 76 Pac. 143.

355 Magee v. Fogerty, 6 Mont. 237, 11 Pac. 668.

356 Wallace v. Lewis, 9 Mont. 399, 24 Pac. 22.

357 Wheeler v. Farmer, 38 Cal. 203-210.

358 Cal. Code Civ. Proc., § 556; Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

359 First Nat. Bank v. Swan, 3 Wyo. 356, 23 Pac. 743; Guest v. Ramsey, 50 Kan. 709, 33 Pac. 17; Reed v. Maben, 21 Neb. 696, 33 N. W. 252.

360 Freeborn v. Glazer, 10 Cal. 337; Cupit v. Park City Bank, 10 Utah, 294, 37 Pac. 564.

the release of attached property be not invoked, the levy remains in force.[361]

§ 2694. Contents of the motion.—Defendant is not entitled to strike from his motion to dissolve an attachment his statement that he did not own the property, which statement defeats his motion.[362] A motion to discharge an attachment cannot be given the effect of a demurrer to the complaint so as to demand consideration of it as a demurrer.[363] A motion to dissolve an attachment is sufficient to call attention to defects in the affidavit apparent by a failure to comply with the statute.[364]

§ 2695. Who may make the motion.—Defendant may make a motion to discharge the attachment.[365] A mortgagee, claiming to be in possession of the goods at the time the levy is made, may move to discharge the attached property.[366]

§ 2696. Against steamers, boats, and vessels.—In actions against steamers, vessels, and boats, after appearance in the action of the owner, the attachment may, on motion, be discharged in the same manner and on like terms and conditions as attachments in other cases.[367] And the court whose mesne or final process has made the first actual seizure will have exclusive power over its distribution, and its judgments will be regarded as complete adjudications of the subject-matter of litigation.[368]

§ 2697. Affidavits in support of motion.—Under the statutes providing that only when the motion is made on affidavits in defendant's behalf, or papers or evidence in the case, can plaintiff oppose it by affidavit or other evidence than that on which the attachment was ordered, a motion to dissolve an attachment should be supported by an affidavit clearly negativing the truth of the allegations of plaintiff's affidavit.[369]

361 Collins v. Burns, 16 Colo. 7, 26 Pac. 145.

362 People's Bank v. Morris, 71 Kan. 849, 80 Pac. 586.

363 Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. 653.

364 Bank of Commerce v. Latham, 8 Wyo. 316, 57 Pac. 184.

365 Cal. Code Civ. Proc., § 556.

366 Symms Grocer Co. v. Lee, 9 Kan. App. 574, 58 Pac. 237.

367 Cal. Code Civ. Proc., § 825. As to claims for wages, see Cal. Code Civ. Proc., § 823.

368 Averill v. Steamer Hartford, 2 Cal. 308.

369 Bank of Commerce v. Latham, 8 Wyo. 316, 57 Pac. 184.

Where defendant made three affidavits, the first of which did not deny the security of the notes sued on, the second of which did deny that certain property had been pledged, and the third of which was made after it had been decided in another suit that the said property had been pledged, and affirmed that the pledge extended to cover the notes in the suit at hand, the affidavits were not sufficient denials of plaintiff's allegations to entitle defendant to a discharge of the attachment.[371]

A motion to discharge a warrant of attachment should be refused unless the defendant or other moving party denies the existence of every statutory ground alleged in the affidavit upon which the warrant was issued.[372] A motion to discharge on the grounds of insufficiency of plaintiff's affidavit should point out explicitly the nature of the insufficiency.[373]

§ 2698. Burden of proof.—The burden of proof is on the plaintiff to support his affidavit where it is denied by affidavit of the defendant on motion to dissolve the attachment.[374] Where the application for a dissolution is on grounds not apparent on the record, the fact that such matters had been orally conceded on a prior application does not release the applicant from proving them.[375] Under the statutes of Washington,[376] where a defendant in attachment has made a motion to discharge the attachment upon affidavit, he has no right to depart from that mode of proof and introduce oral testimony in support of the motion.[377] A motion to dissolve an attachment should not be decided upon facts which have been made to appear in another action, without making them a part of the record in the attachment action.[378]

When the allegations of the plaintiff's affidavits dispute the affidavits furnished on the part of the defendant, and the papers upon which the attachment was granted are sufficient, and the evidence of the plaintiff is fairly preponderating, the attachment

371 Watson v. Loewenberg, 34 Or. 323, 56 Pac. 289.

372 Hornick Drug Co. v. Lane, 1 S. Dak. 129, 45 N. W. 329; Keith v. Stetter, 25 Kan. 100. See Talbott v. Randall, 3 N. Mex. 230 (364), 5 Pac. 537; Ross v. Fowler, 42 Miss. 493.

373 Windt v. Banniza, 2 Wash. 147, 26 Pac. 189.

374 Williams v. Farmers' Gin etc. Co., 13 Okla. 5, 73 Pac. 269.

375 Goldman v. Floter, 142 Cal. 388, 76 Pac. 58.

376 Laws 1885-1886, p. 45, § 32.

377 Hansen v. Doherty, 1 Wash. 461, 25 Pac. 297.

378 Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759.

should be upheld.[379] Where plaintiff's grounds have been put in issue by a motion to discharge, he must establish one or more of them by a preponderance of the evidence, or on the hearing the motion will be sustained.[380]

In proceedings to discharge an attachment, it is first incumbent upon the defendant to negative the cause assigned for suing out the writ, and after this the burden is upon the plaintiff in attachment to show cause why the attachment should not be discharged, and he must establish such facts as justify the issuing of the writ.[381] An affidavit for attachment stating the single ground therefor, "that the defendant has failed to pay the price of articles delivered to him, which he should have paid for on the delivery thereof," when duly traversed by the defendant, presents an issue requiring affirmative proof by the plaintiff to sustain either the attachment or the cause of action.[382]

§ 2699. **Competent evidence.**—Where an attachment affidavit charges a fraudulent disposition of property by a firm, plaintiff is limited in his proof to that class of transfers, and evidence that the son-in-law of one of the defendant partners shortly after a general assignment by the firm paid off a mortgage on defendant's property with defendant's money was not competent, and, without tracing any property or the proceeds thereof from either of defendant partners to his wife, it is immaterial, in support of the attachment affidavit, to show that defendants' wives purchased the firm property from the assignees in bankruptcy, but it is competent to show that defendants transmitted money through the post-office shortly before the attachment and the assignment for creditors.[383] Where defendant did acts which were uncontradicted and irreconcilable with a lawful purpose, he could not testify as to his motives in doing the acts.[384] A plea in abatement made by a non-resident corporation will be

379 Walton v. Chadwick, 6 Misc. 293, 26 N. Y. Supp. 789; Kirby v. Colwell, 81 Hun, 385, 30 N. Y. Supp. 880.

380 Bender v. Rinker, 21 Wash. 633, 59 Pac. 503.

381 Drake v. Avanzini, 20 Colo. 104, 36 Pac. 846; Godbe-Pitts Drug Co. v. Allen, 8 Utah, 117, 29 Pac. 881; Wyman v. Wilmarth, 1 S. Dak. 172, 46 N. W. 190; Champion Machine Co. v. Updyke, 48 Kan. 404, 29 Pac. 573; Noyes v. Lane, 1 S. Dak. 125, 45 N. W. 327; Standard Implement Co. v. Parlin etc. Co., 51 Kan. 566, 33 Pac. 363.

382 Miller v. Godfrey, 1 Colo. App. 177, 27 Pac. 1016.

383 First Nat. Bank v. Lesser, 9 N. Mex. 604, 58 Pac. 345.

384 Curran v. Rothschild, 14 Colo. App. 497, 60 Pac. 1111.

disregarded as frivolous when there is no effort to secure a personal judgment.[385]

After making an order for the discharge of an attachment, a judge of a district court at chambers, on application of the plaintiff and a showing that such order was obtained by perjury and fraud, may, after notice to the adverse party, grant a rehearing on such motion, to ascertain whether the former ruling was induced by such unlawful means, and if he shall so determine, he may rescind the order dissolving the attachment and overrule the motion therefor.[386]

§ 2700. **Jurisdiction.**—Where, on attachment, the defendant is personally served with summons, and appears to take issue upon the allegations of the affidavit, but makes no defense in the main action, the court acquires complete jurisdiction;[387] otherwise, of an appearance by a defendant who has not been served with process, moving only to discharge the attachment for want of the jurisdictional facts to sustain it.[388] If property seized by the sheriff under attachment against a debtor is claimed by a third person, who files his affidavit and bond as required by statute, such proceeding is a new and independent action which must be placed upon the trial docket of the court in the county where the property was seized, and the court of no other county has jurisdiction of the subject-matter of the action.[389]

§ 2701. **Jury trial.**—Under the Washington practice, a motion to discharge an attachment is addressed to the consideration of the court or judge, and the statute of that state does not contemplate the interposition of a jury to determine it or to aid in its determination.[390] Nor do the statutes of Wyoming entitle a defendant to a trial by jury of a motion to discharge the attachment.[391] This is the practice in many of the states.[392] But

385 Southern California Fruit Exchange v. Stamm, 9 N. Mex. 361, 54 Pac. 345.

386 Guernsey v. First Nat. Bank, 63 Kan. 203, 65 Pac. 250.

387 Roy v. Union Mercantile Co., 3 Wyo. 417, 26 Pac. 996.

388 Belknap v. Charlton, 25 Or. 41, 34 Pac. 758; Bonner v. Brown, 10 La. Ann. 334.

389 State v. Superior Court, 5 Wash. 639, 32 Pac. 553.

390 Windt v. Banniza, 2 Wash. 147, 26 Pac. 189.

391 Wearne v. France, 3 Wyo. 273, 21 Pac. 703.

392 Baer v. Otto, 34 Ohio St. 11; Grimes v. Farrington, 19 Neb. 44, 26 N. W. 618; Holland v. White, 120 Pa. St. 228, 13 Atl. 782, 783; Hardesty v. Campbell, 29 Md. 533.

in Colorado, where attachment proceedings have been instituted and a traverse has been filed, it is not error to submit the issue to the jury for a separate finding.[393]

§ 2702. **Waiver of lien.**—An attaching creditor does not waive his attachment lien by taking judgment and selling the attached property under execution, while an appeal from an order dissolving the attachment is pending and undetermined.[394] Where the court ordered a sale of perishable property, and plaintiff bought it, he is not estopped from asserting title and right of possession to the property.[395]

§ 2703. **Waiver of defects in affidavit.**—Where the statements of the affidavit are regularly traversed by the defendant without the court's attention being called to its supposed defects, and the issues are found against him upon the trial, or if the amount of actual damage proved by the plaintiff be less than the amount averred in the affidavit, the judgment will not be reversed on such grounds.[396] Appearance and judgment have the effect to waive objection to the writ of attachment as being issued by the clerk of the probate court, rather than by the clerk of the district court, and it is too late to raise the question in an action on the forthcoming bond.[397] When defendant files his affidavit or offers his evidence in rebuttal of the plaintiff's affidavit, he waives any error of the court in not dismissing the attachment for want of evidence on the part of the plaintiff.[398] Defects in an affidavit in attachment must be taken advantage of in the court below before trial upon the traverse.[399]

§ 2704. **When writ will be discharged for irregularity.**—If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged.[400] However, such discharge may be prevented, if at or before the hearing of an application for its discharge the writ, affidavit, or undertaking be amended to conform to the provisions

393 Taylor v. Buckley, 3 Colo. App. 79, 33 Pac. 74.

394 Ryan v. Maxey, 14 Mont. 81, 35 Pac. 515.

395 Hagar v. Haas, 66 Kan. 333, 71 Pac. 822.

396 De Stafford v. Gartley, 15 Colo. 33, 24 Pac. 580.

397 Wagner v. Romero, 3 N. Mex. 131, 3 Pac. 50.

398 Dunn v. Claunch, 13 Okla. 577, 76 Pac. 143.

399 Rice v. Hauptman, 2 Colo. App. 565, 31 Pac. 862.

400 Cal. Code Civ. Proc., § 558.

of the code.[401] Residence within the state of two of six defendants in an attachment proceeding which is based on an affidavit sufficient only for non-residents will justify a discharge of the attachment, and the application for this discharge may be made before any attachment shall have actually been levied.[402]

§ 2705. **When writ will be discharged for lack of cause.**—If the complaint states no cause of action, and does not admit of amendment, the attachment should be dissolved. If the complaint can be amended, the plaintiff should be allowed to amend, pending the motion to dissolve the attachment.[403] An attachment will be dissolved if the debt for which it was procured was secured by a mortgage.[404] An attachment is dissolved by an assignment for the benefit of creditors made before judgment.[405] Where a demurrer to the complaint is sustained, and no application is made to amend, the attachment may be dismissed.[406]

An attachment sued out on the ground of fraudulent conveyance of debtor's property by a sale in bulk of a stock of goods will be dissolved on a finding that such sale was in good faith, though the sale was not recorded, since the statutory presumption of fraud arising from such a sale, under the Oklahoma statute,[407] will thereby be overcome.[408]

§ 2706. **When writ will be discharged for causes subsequent to attachment.**—In some states, the death of defendant after the levy of an attachment destroys the lien of the attachment, and the property passes into the hands of the administrator,[409] while in other states the attachment does not abate by the death of the defendant.[410] An assignment for the benefit of creditors, made before judgment, works a dissolution of the attachment.[411]

401 Cal. Code Civ. Proc., § 558, as amended 1909.

402 Sparks v. Bell, 137 Cal. 415, 70 Pac. 281.

403 Hathaway v. Davis, 33 Cal. 161; Muth v. Erwin, 14 Mont. 227, 36 Pac. 43; Josephi v. Mady Clothing Co., 13 Mont. 195, 33 Pac. 1; De Stafford v. Gartley, 15 Colo. 32, 24 Pac. 580.

404 Kinsey v. Wallace, 36 Cal. 463.

405 Tichenor v. Coggins, 8 Or. 270.

406 Carstens v. Milo, 40 Wash. 335, 82 Pac. 410.

407 Sess. Laws 1903, p. 249, ch. 30, § 1.

408 Williams v. Fourth Nat. Bank, 15 Okla. 477, 82 Pac. 496, 2 L. R. A. (N. S.) 334.

409 Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49; Pancost v. Corporation of Washington, 5 Cranch C. C. 507, Fed. Cas. No. 10706.

410 Wartman v. Pecka, 8 Ariz. 8, 68 Pac. 534; Mitchell v. Schoonover, 16 Or. 211, 8 Am. St. Rep. 282, 17 Pac. 867; White v. Ladd, 34 Or. 422, 56 Pac. 515.

411 Tichenor v. Coggins, 8 Or. 270.

§ 2707. When the writ will not be discharged.—Because plaintiff fails to secure judgment for the full amount claimed by him does not authorize a discharge of the attachment.[412] Where defendant was insolvent, and transferred all of his stock and property to a corporation, organized to receive it and divide it among his creditors, who received certificates of stock *pro rata*, it matters not that defendant may have desired to satisfy his creditors; for the effect of the proceedings was to delay them, and the transfer was fraudulent in that much, and the attachment brought by one of the creditors should be sustained.[413]

In New York, an attachment, issued as a provisional remedy under the code, cannot be dissolved as to a part of the property merely upon giving security as to such part, under sections 240 and 241 of the Code of Civil Procedure. An application for a discharge upon the undertaking specified in those sections must relate to the whole of the property levied upon.[414] It is otherwise in California.[415]

§ 2708. Order or judgment vacating a writ of attachment.—An order of dissolution, made after two writs issued in the same action were levied on the same property, dissolved both attachments, though using the singular "attachment," in the absence of proof that it was limited to one of the writs.[416] Where a journal entry on a motion to dissolve an attachment is to the effect that, after hearing the allegations of the pleadings, the attachment is dissolved, the contention of defendant in attachment, that the court heard evidence and did not discharge the property because of any insufficiency of the petition, cannot be maintained.[417]

§ 2709. Effect of dissolution.—Where suit is brought on a note not yet due, as by the Washington code [418] it may be, and an attachment had prior to the maturity of the debt, when nothing but time is wanting to fix it absolutely, and when the affidavit for the writ, in addition to that fact, states certain prescribed

412 Finney v. Moore, 9 Idaho, 284, 74 Pac. 866.

413 Curran v. Rothschild, 14 Colo. App. 497, 60 Pac. 1111.

414 Royal Ins. Co. v. Noble, 5 Abb. Pr. (N. S.) 54.

415 Cal. Code Civ. Proc., § 554.

416 Pennsylvania Mortg. Inv. Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246.

417 Brown v. Cairns, 63 Kan. 882, 65 Pac. 231.

418 Wash. Bal. Codes, § 5352, 2 Hill's Code, § 290.

grounds for attachment, the action is dependent on the attachment, and must fall with it; and hence, if objection is made, a valid judgment cannot be entered therein after the attachment is dissolved, though the note is then due.[419]

§ 2710. **Appeal from the order of dissolution.**—An appeal from an order discharging an attachment, taken before the passage of the laws of 1901 (p. 28), is not authorized by the general laws of Washington.[420] In New Mexico, an order vacating an attachment is not a final order within the organic act, authorizing an appeal to the supreme court from final decisions of the district court.[421] But an order improperly or irregularly dissolving an attachment will be reversed in California.[422]

§ 2711. **Final judgment for plaintiff.**—There is no statute requiring a judgment in attachment to recite that an execution shall issue or that it is a judgment *in rem*.[423] It need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it.[424] A judgment ordering the sale of attached real property is not conclusive as to the validity of the seizure of the property in an action begun by attachment where defendant died before service of the summons, and the judgment is not void on its face, as including separate parcels of land not owned by the defendant, when such facts are not shown by the officer's return of service of the attachment.[425]

§ 2712. **Satisfaction of judgment.**—If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose—1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

419 Augir v. Foresman, 23 Wash. 595, 63 Pac. 201.

420 Wash. Bal. Codes, § 6500. See, also, Spokane Dry Goods Co. v. Fritz, 26 Wash. 433, 67 Pac. 252.

421 Jung v. Myer, 11 N. Mex. 378, 68 Pac. 933.

422 Reiss v. Brady, 2 Cal. 132.

423 Kerns v. McAulay, 8 Idaho, 558, 69 Pac. 539.

424 Low v. Henry, 9 Cal. 538.

425 White v. Ladd, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739.

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales be conducted as in other cases of sales on execution.[426]

A lien on land acquired by an attachment cannot be rendered effectual for the purpose of impeaching a conveyance of the land made by the defendant in the attachment, until judgment is obtained in the suit in which the attachment is issued.[427] An attachment lien upon the property can be enforced only by a sale of the attached property under execution.[428]

Plaintiff, on January 10, 1858, in a suit against M. and others, composing the W. Company (a corporation), but not making the corporation as such a party defendant, attached a quartz-mill and ledge belonging to the corporation. Subsequently, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered on August 14, 1858, the property sold, and the plaintiff purchased it. In October, 1857, the year prior to the former proceedings, W. received from the corporation a chattel mortgage on this property, had a decree of foreclosure on August 9, 1858, and sale in October following, and W. purchased the property. Plaintiff acquired no lien by the attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ, and his rights attached only from the date of his judgment, August 14, 1858, while defendants claimed under W.'s judgment of August 9, 1858, and had the prior right.[429]

§ 2713. **Sale of property.**—Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court, or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action.

426 Cal. Code Civ. Proc., § 550.

427 McMinn v. Whelan, 27 Cal. 300.

428 Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49.

429 Collins v. Montgomery, 16 Cal. 398.

Such an order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action.[430] But no order of court is necessary to authorize a sale of perishable property by the officer.[431]

§ 2714. **Distribution of proceeds.**—In case of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers, or any other person who renders services or performs work, who have claims against the defendant for labor done for the defendant within sixty days prior to the levy, may each file a verified statement of his claim, and the amount thereof, with the officer executing the writ, and give copies thereof to the debtor and the creditor, at any time before the actual sale of property levied on, or, in the event of a levy upon money, at any time before the transfer of such money under execution; and such claim not exceeding one hundred dollars, unless disputed, must be paid by such officer out of the proceeds of the sale, or, in the event of a levy on money, out of such money. If any or all of the claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim or priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim.[432]

§ 2715. **Paying over proceeds.**—The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them.[433] A sheriff who receives an attachment, regular upon its face, cannot pay over the money obtained by

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431 Low v. Henry, 9 Cal. 538.
432 Cal. Code Civ. Proc., § 1206.
433 Dixey v. Pollock, 8 Cal. 570.

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him from the sale of property levied on by virtue of the writ to a junior attaching creditor, because the complaint in the action in which the attachment was issued did not set forth a cause of action upon which an attachment could issue.[434]

A sheriff is bound to account to a successful defendant in an attachment suit for money collected under the attachment from such defendant, but such defendant must show that the money belonged to himself.[435]

§ 2716. **Balance due plaintiff—How collected.**—If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, after deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment.[436]

§ 2717. **Payment of sheriff's fees.**—The sheriff is not required to release property levied upon under the writ of attachment until his fees and expenses are paid, and he may retain the property until he is paid. He is the agent of the plaintiff in levying the attachment, and the latter cannot relieve himself from liability for the expenses incurred in such agency by a dismissal of the action or a mere direction to release the property.[437] Nor can the parties to the action, by agreement between themselves for its dismissal, deprive the sheriff of his fees, or compel him to look to the solvency or caprice of the plaintiff therefor.[438]

§ 2718. **Judgment for the defendant.**—If the defendant recover judgment against the plaintiff, and no appeal is perfected, and no undertaking given on appeal, as provided in section 946 of the California code, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and

434 McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115.

435 Michener v. Fransham, 33 Mont. 108, 81 Pac. 953.

436 Cal. Code Civ. Proc., § 551.

437 Perrin v. McMann, 97 Cal. 52, 31 Pac. 837.

438 Perrin v. McMann, 97 Cal. 52, 31 Pac. 837; Robinett v. Connolly, 76 Cal. 56, 18 Pac. 130. But see McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333.

all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom.[439] Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the office of the county recorders in which the notices of attachment have been filed, and be indexed in like manner.[440]

§ 2719. **When property is claimed by a third party.**—"If any personal property attached be claimed by a third person as his property, the same rules shall prevail as to the contents and making of said claim, as to the holding of said property, as in case of a claim after levy upon execution, as provided for in section 689 of the Code of Civil Procedure."[441]

If the property levied upon be claimed by a third person as his property, by a written claim verified by the oath of said claimant or his agent, setting out his right to the possession thereof, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking by at least two good and sufficient sureties in a sum equal to double the value of the property levied upon, and the sheriff is not liable for damages for the taking or keeping of such property to any such third person unless such claim is made.[442]

§ 2720. **Claim by third person—Parties.**—A claimant to property attached cannot intervene and be made a party in an action to which the attachment is auxiliary.[443] Where replevin is brought against a sheriff to recover chattels held under attachment, it is not error to permit the attachment plaintiff to be substituted as defendant, and to dismiss the cause as to the sheriff.[444]

§ 2721. **Claim by third party—Prior lien.**—A sheriff, having attached carriages in the possession of one doing a carriage business, and appointing him as custodian thereof while they were

439 Cal. Code Civ. Proc., § 553; Loveland v. Alvord Min. Co., 76 Cal. 562, 18 Pac. 682.

440 Cal. Code Civ. Proc., § 559.

441 Cal. Code Civ. Proc., § 549.

442 Cal. Code Civ. Proc., § 689.

443 Stanley v. Foote, 9 Wyo. 335, 63 Pac. 940.

444 Moore v. Calvert, 8 Okla. 358, 58 Pac. 627.

mingled with the other carriages, is estopped to claim any right therein as against a subsequent mortgagee, accepting in good faith from the custodian, though the sheriff had been compelled to pay for the carriages to a stranger to the attachment proceedings, who was the real owner thereof.[445] If personal property in the possession of a third person is attached as the property of another, and such third person procures a return of the property to him by giving to the officer a forthcoming bond for the redelivery of the property or its appraised value to the officer, such third person is afterwards, as between himself and the officer, or the attachment plaintiff, estopped from asserting paramount title in himself.[446]

§ 2722. **Contest of the attachment by third parties.**—Creditors of the defendant who have, subsequent to the attachment, acquired liens upon the attached property cannot defend the suit in lieu of defendant, but may defend against such imperfections as render the proceedings void.[447] But a subsequent intervening attaching creditor who alleges that plaintiff has no legal claim, that the writ issued by him is void, that the property attached by both is insufficient to pay intervener's claim, and that the defendant has not property enough to pay both of them, should be allowed to intervene.[448] Where the debtor has made a general assignment for the benefit of his creditors, and the property is attached by a part of the creditors and sold, the balance of the creditors may interplead in the attachment and have the funds declared a trust, to be administered in equity and distributed *pro rata,* and for the appointment of a receiver.[449]

§ 2723. **Demand or affidavit of third party.**—Under the California code, providing that a third party claiming property must file a claim verified by oath, and allowing the sheriff to turn the property over to such third party unless the plaintiff give him an indemnifying bond, where such is done, and the sheriff acts on the claim and procures an indemnifying bond from the plaintiff, it is immaterial, in an action for the property, that claimant's oath

445 Gottlieb v. Barton, 13 Colo. App. 147, 57 Pac. 754.

446 Greenville Nat. Bank v. Evans-Snyder-Buel Co., 9 Okla. 353, 60 Pac. 249.

447 Wichita Nat. Bank v. Wichita Produce Co., 8 Kan. App. 40, 54 Pac. 11.

448 McEldowney v. Madden, 124 Cal. 108, 56 Pac. 783.

449 Hockaday v. Drye, 7 Okla. 288, 54 Pac. 475.

was defective, since, having accomplished that for which it was intended, the sheriff was not prejudiced by its defects.[450]

In an action to recover money, an attachment having been levied on land, which was sold on judgment, the district court has jurisdiction to entertain a motion by a stranger to the suit holding title to such land, to release the land from the levy and set aside the sale.[451]

§ 2724. **Claim of third party—Pleadings and issues.**—An attaching creditor's complaint to recover its judgment against the debtor from a subsequent attaching creditor, who had levied on the same property after this plaintiff had released it on a forthcoming bond, set forth those facts and a claim that the bond did not work as a waiver of plaintiff's lien on the property, but failed to state whether plaintiff's attachment was traversed or not, and, if so, that it was sustained. The complaint is insufficient.[452]

An officer sued by a buyer for possession of property seized under attachment against the seller may prove that the sale was fraudulent as to creditors, under a denial of plaintiff's title and possession, and an allegation of title in the seller, in connection with a plea of justification.[453] When the husband, under power of attorney from his wife, conveyed real estate to himself, and afterwards conveyed it to her creditor, in satisfaction of her debt, the fraudulent conveyance to hinder creditors was thus overcome.[454]

§ 2725. **Evidence in collateral proceedings.**—Evidence to impeach an affidavit of attachment is not admissible in a collateral proceeding by a stranger to the attachment suit to recover possession of the property, but where the third party had purchased the stock of the defendant in attachment, and had been in continual possession of it for several years, he is entitled to recover such stock, though at the time of the levy the stock was on the land of defendant.[455]

450 Kellogg v. Burr, 126 Cal. 38, 58 Pac. 306.

451 Knight v. Rhoades, 10 Kan. App. 38, 61 Pac. 869.

452 Hallack Paint etc. Co. v. Denver Nat. Bank, 14 Colo. App. 79, 59 Pac. 964.

453 Banning v. Marleau, 121 Cal 240, 53 Pac. 692.

454 Tennis v. Barnes, 11 Colo. App. 196, 52 Pac. 1038.

455 Hillman v. Griffin (Cal.), 59 Pac. 194.

In an action against the sheriff for attached property of M., the former owner, who had transferred the goods to a creditor by bill of sale in cancellation of M.'s debt, which creditor put M.'s husband and then, successively, several others in charge of the goods, and finally sold them to plaintiff in the action, who was one of the custodians of the goods, the goods should be considered as the property of plaintiff.[456] Where the wife of a merchant who made an assignment for the benefit of his creditors had previous to their marriage deeded land to him, now tries to have the deed declared a mortgage, and to get the land released from an attachment brought by one of the creditors, she should succeed, for the reason that the husband told this creditor that he would turn the land in with the assignment but that he feared there might be objections. The creditor did not want to talk or learn what those objections might be, but he had sufficient notice to place the wife's equity ahead of his attachment.[457]

After plaintiff went into possession, and dealt with the goods formerly belonging to M. as her own for a considerable period of time, she employed M. to help in the store on a stipulated salary, it was proper to instruct the jury that there was neither allegation nor proof that there was no change of possession.[458]

§ 2726. **Claim by third party—Judgment.**—Where parties claim the right to property attached as belonging to another, and the property has been brought into court and sold under the attachment, a judgment for money is sufficient. It need not be for the possession of the goods, for they have been sold and are out of reach of the court.[459] An objection that a motion that the sheriff be directed to pay preferred labor claims out of the fund attached was entitled in the action in which the attachment was issued, and not in the name of such claimants, was untenable, since it was proper, for the protection of the sheriff, that the order authorizing such payment should be made in the original case.[460]

§ 2727. **Claim by third party—Appeal.**—The rule that the appellate court will not review the evidence to determine its weight,

456 Sargent v. Cameron, 11 Colo. App. 200, 53 Pac. 394.

457 Osgood v. Osgood, 35 Or. 1, 56 Pac. 1017.

458 Sargent v. Cameron, 11 Colo. App. 200, 53 Pac. 394.

459 Ranney-Alton Mercantile Co. v. Hanes, 9 Okla. 471, 60 Pac. 284.

460 Rauer v. Silva, 128 Cal. 42, 60 Pac. 525.

where it is conflicting, applies to cases where the owner of property which has been attached as the property of another makes claim thereto, as well as to trials on issues made under pleadings in a case. [461]

§ 2728. **Bonds in attachment.**—There are four bonds that may be given in attachment as follows: 1. The bond given by the plaintiff in support of the attachment, as in section 2799, form No. 734; 2. The bond given by the defendant or the one having possession of the goods, to prevent an attachment, as in section 2809, form No. 744; 3. The bond given by defendant to secure the dismissal of an attachment, as in section 2808, form 743; 4. The bond given by plaintiff to indemnify the sheriff and justify him in holding attached property which is claimed under oath by a third party, as in section 2815, form No. 750. If the bond substantially conforms to the statute, and is voluntarily given, it is valid at common law.[462]

§ 2729. **Character of the indemnity bond to the sheriff.**—An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect. If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.[463] An indemnity bond given to indemnify the sheriff on account of the execution of a writ of attachment indemnifies him against liability for the seizure, and he becomes liable therefor when a judgment is rendered against him. And he makes a *prima facie* case under the statute against the sureties upon the bond by the production of the indemnity bond, the judgment against him, and proof of notice to the sureties to appear and defend the action in which the judgment was recovered.[464]

§ 2730. **Release of sureties on plaintiff's attachment bond.**—Under the laws of Washington authorizing an appeal from an order refusing to discharge an attachment, and providing that

461 Knight v. Rhoades, 10 Kan. App. 38, 61 Pac. 869.

462 Bailey v. Ætna Indemnity Co., 5 Cal. App. 740, 91 Pac. 416.

463 Davidson v. Dallas, 8 Cal. 227.

464 Moore v. McSleeper, 102 Cal. 277, 36 Pac. 593. See Pieper v. Peers, 98 Cal. 42, 32 Pac. 700.

an appeal from a final judgment should bring up for review any order in the same action made before or after judgment, a dissolution of attachment is reviewable on appeal from the final judgment; and therefore an action on the attachment bond while the principal action is pending on appeal, and the right to attachment undetermined, is premature; and the statute[465] providing that an action may be brought on the attachment bond after a dissolution, without waiting for final judgment, is impliedly repealed.[466]

§ 2731. Release of sureties on delivery bond of defendant.—The sureties on a bond to release attached property are discharged upon the nonsuit of plaintiff, notwithstanding the fact that the nonsuit is reversed on appeal and plaintiff finally recovers "judgment in the action" on a retrial.[467] The dissolution of an attachment will not in every case, however, discharge the sureties on a redelivery bond. In a case arising under the California insolvent act of 1880, it was held that notwithstanding an assignment dissolved an attachment previously levied and the insolvent was thereafter prevented by the adjudication of insolvency from returning the property, nevertheless the sureties were held to answer on their undertaking that the defendant would redeliver the property, or they would pay the value thereof.[468]

§ 2732. Rights of sureties.—In an attachment against two defendants, if the property of one only is seized, and an undertaking is executed to release the same, and judgment is gained on the note sued on against both of the defendants, which judgment is paid by the surety, or one of the defendants, such surety may enforce the judgment on assignment against both of the defendants.[469] If the defendant obtains an order for the release of the attached property by delivering to the court an undertaking executed by sureties, conditioned to pay the plaintiff any judgment he may recover, and the property is thereupon released, whenever the liability of the sureties is fixed by the rendition of the judgment in favor of the plaintiff, the sureties have a right to tender to the

465 Wash. Bal. Codes, § 5357, 2 Hill's Code, § 295.

466 Maxwell v. Griffith, 20 Wash. 106, 54 Pac. 938.

467 Hamilton v. Bell, 123 Cal. 93, 55 Pac. 758.

468 Rosenthal v. Perkins, 123 Cal. 240, 55 Pac. 804.

469 March v. Barnet (Cal.), 51 Pac. 20.

plaintiff the full amount of the judgment, and, if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking.[470]

Bondsmen may be relieved from liability on the bond by offering to redeliver the attached property into the hands of the sheriff.[471]

§ 2733. **Suit on bond—Parties.**—Where a garnishment bond is given to two defendants, recovery may be had on the bond though only one obligee sustained damage.[472] And in a suit on a redelivery bond the sureties on the bond are liable though the judgment was recovered only against one of the defendants, and one who did not own the attached property.[473] It is a question whether each of the obligors on a bond are liable to the sheriff for the whole amount of the judgment against him, or whether he must sue each for his share, and not leave the question of contribution to the sureties.[474] In an action on a bond of indemnity given by several attaching creditors to the sheriff, a recovery must be had against all or none, unless one or more has set up and maintained a defense personal to himself.[475] An undertaking given to a sheriff to procure a release of goods attached is for the benefit of the plaintiff who may sue on it, and if the sheriff takes a sufficient statutory undertaking he has no further responsibility.[476]

§ 2734. **Consideration of the undertaking.**—An undertaking on attachment relating to live-stock is not without consideration, on the theory that the writ commanded the sheriff to take all of defendant's property, and was not such as is contemplated by law.[477] An undertaking to procure the release of an attachment becomes binding upon its makers as a common-law obligation when the order of court discharging the attachment is obtained, and cannot be repudiated in an action upon it by those who asked for and received the benefits, even if its conditions are

470 Hayes v. Josephi, 26 Cal. 540; Curiac v. Packard, 29 Cal. 194.

471 Rider v. Thomas Crowe Machinery Co., 36 Colo. 366, 85 Pac. 696.

472 Harrington v. Gordon, 42 Wash. 692, 80 Pac. 187.

473 McCormick v. National Surety Co., 134 Cal. 510, 66 Pac. 741.

474 White v. Fratt, 13 Cal. 521.

475 Thomas v. Barnes, 34 Or. 416, 56 Pac. 73.

476 Curiac v. Packard, 29 Cal. 194.

477 Smith v. Fisher, 24 Utah, 506, 68 Pac. 849.

more onerous than those of the statutory undertaking.[478] It must be averred and proved that the attached property was restored.[479]

§ 2735. **Extent of the liability.**—A bond indemnifying the sheriff for release of a levy against all persons whomsoever, given at a time when it was known that the plaintiff was likely to dismiss his action, which he afterwards did do and seized the same property, the sheriff is secured against the acts of the plaintiff, even after he has dismissed the action.[480] In an undertaking of sureties to pay the value of property about to be levied upon, their liability does not include the liability of the defendant in attachment.[481]

In a bond given to release property seized on an attachment, the obligors undertook to pay, on demand, to plaintiffs in the action the amount of the judgment and costs, not to exceed three thousand dollars, which plaintiff might recover. In the bond the action was recited as for one thousand six hundred dollars. Upon delivery of the bond, the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the bond. It was held that recovery may be had on the bond to the extent of the penalty. Such a bond is not statutory, but is valid as a common-law obligation, and is a sufficient compliance with the statute. The amount recited to be the amount for which the attachment was issued may be corrected and explained by parol.[482] A bond given voluntarily to the sheriff, on delivery of the property, is valid at common law.[483]

Where the sheriff, under a writ of attachment in the suit of plaintiff against his partners, is about to levy upon the property of the firm, and a bond is executed by L. and J., as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble, and expense he may be put to by reason of the non-seizure of the property, and also "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner,

478 Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072. And see Lightle v. Berning, 15 Nev. 389.

479 Drovers' Live Stock Com. Co. v. Custer County State Bank, 19 Okla. 302, 91 Pac. 850.

480 Smith v. Brooking, 10 Kan. App. 523, 63 Pac. 19.

481 Curtin v. Harvey, 120 Cal. 620, 252 Pac. 1077.

482 Palmer v. Vance, 13 Cal. 553.

483 Id.; Gardner v. Donnelly, 86 Cal. 367, 24 Pac. 1072.

it was held that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants."[484]

§ 2736. **Conditions precedent to suit on bond.**—A bond which is not a statutory undertaking, but is valid as a common-law obligation, does not require an execution to issue against the judgment debtor as a condition precedent to suit on such bond.[485] If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section 540 or section 555 of the California code, or he may proceed as in other cases upon the return of an execution.[486]

The condition of section 552 of the California Code of Civil Procedure, that after an execution against defendant in attachment is returned unsatisfied, etc., it still requires the issuance of an execution against defendant who has made an assignment under the insolvent act of 1880 before suit on the bond. This reversed the prior judgment in a California case.[487] Return of an execution unsatisfied, because the defendant's property is claimed under mortgage made after the property was released on a redelivery bond, is sufficient demand by plaintiff for the return of the property to support an action against the sureties on the bond.[488]

§ 2737. **A second bond given.**—By bringing action on a second delivery bond accepted by the sheriff in discharge of the first one, plaintiff is estopped from suing on the bond so released.[489]

484 Heynemann v. Eder, 17 Cal. 433.
485 Palmer v. Vance, 13 Cal. 553.
486 Cal. Code Civ. Proc., § 552.
487 Rosenthal v. Perkins (Cal.), 53 Pac. 444, 123 Cal. 240, 55 Pac. 804.
488 Mullally v. Townsend, 129 Cal. xviii, 61 Pac. 950, 62 Pac. 119.
489 Hesser v. Rowley, 139 Cal. 410, 73 Pac. 156.

§ 2738. **Limitations on suit on bond.**—An action to recover damages on an attachment bond is an action on a written contract, and, in Kansas, is not barred until the expiration of five years from the time the right of action accrues, which time is from the final determination of the district court that the order was wrongfully obtained.[490]

§ 2739. **Suit on bond—Complaint.**—The complaint in an action on an undertaking, given under section 540 of the California Code of Civil Procedure, which alleges that the same was given to release certain property taken under attachment, is sustained by proof of an undertaking which recites that it was given to prevent a levy.[491] The complaint must allege the execution or delivery of the undertaking.[492]

Where defendant in attachment applies to the court, under sections 554 and 555 of the California Code of Civil Procedure, for a discharge from the attachment, and an undertaking is executed by D. and R., reciting the fact of the attachment, and that "in consideration of the premises, and in consideration of the release from attachment of the property attached, as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property, it was held in a suit against the sureties on the undertaking that the complaint need not aver that the property was actually released and delivered to the defendant; that as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and delivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made.[493]

In an action against the sureties on an attachment bond, the complaint does not state facts sufficient when it alleges the execution of the bond by the principals without alleging that the sureties joined in its execution, although it may set out a copy

490 Baker v. Skinner, 63 Kan. 83, 64 Pac. 981.

491 McNamara v. Hammerslag (Cal.), 2 Pac. 391; McCutcheon v. Weston, 65 Cal. 37, 2 Pac. 727.

492 San Francisco Sulphur Co. v. Ætna Indemnity Co., 7 Cal. App. 98, 93 Pac. 888.

493 McMillan v. Dana, 18 Cal. 339. But see Williamson v. Blattan, 9 Cal. 500.

thereof in the complaint, to which the names of the sureties are appended.[494]

An undertaking on attachment is an original, independent contract on the part of the sureties, and must be construed in connection with the statute which authorizes it.[495]

§ 2740. **Suit on bond—Complaint—Defective bond.**—If in an undertaking on attachment a word is omitted by mistake, and by looking at the whole undertaking and the statute it is apparent what word was intended to have been inserted, the omitted word may be supplied, and the contract read as if it had been expressed, without first reforming it by supplying the omitted word.[496]

§ 2741. **Suit on bond—Defense.**—A general denial, unverified, puts in issue an allegation that the property was delivered to the defendant when the bond was approved, and that the defendant had removed it from the territory.[497] A judgment sustaining an attachment is conclusive until reversed or vacated, and a defendant in an attachment suit cannot, when sued on a forthcoming bond, under which the property was returned to him, avail himself of the fact that the property attached was exempt at the time it was seized under the order of attachment.[498] Where several attaching creditors give a bond to the sheriff conditioned that if he will sell the property under any of the attachments defendants will indemnify him against any loss or damage by reason thereof, a direction to release one or more attachments would constitute no defense.[499]

§ 2742. **Suit on bond—Evidence.**—In an action on an attachment bond, evidence showing the condition and value of attached live-stock at times other than the day of their release is admissible, as injuries may have been sustained by reason of the attachment which are not immediately apparent, and it may be shown what cattle are worth when located on and familiar with

494 Seattle Crockery Co. v. Haley, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650.

495 Frankel v. Stern, 44 Cal. 168.

496 Id.

497 Dunn v. Claunch, 15 Okla. 27, 78 Pac. 388.

498 Lane Implement Co. v. Lowder, 11 Okla. 61, 65 Pac. 926.

499 Thomas v. Barnes, 34 Or. 416, 56 Pac. 73.

a range.[500] In an action on defendant's bond given to secure release of property in attachment, where it is shown that a valid judgment was obtained, it will be presumed that the judgment is unpaid, and the burden is on defendant to show payment.[501]

§ 2743. **Suit on bond—Measure of damages.**—Plaintiff and sureties in an action predicated on the Washington statute[502] to compel the delivery of personal property is estopped to dispute the value of the property.[503] In the attachment of shares of stock, the measure of damages on the undertaking is the difference in value of the shares when seized and when restored; and it is no defense that plaintiff might have avoided the damage by giving the statutory bond.[504]

In suits brought to recover for actual damages done by the attachment of live-stock, after the writ of attachment has been traversed and dissolved, where exemplary damages are not claimed, the defendant cannot prove, in mitigation of the actual damages sustained, that he had probable cause to believe the truth of the statements contained in the affidavit on which the writ of attachment issued.[505] In an action on a release bond, conditioned on the performance of any judgment obtained, the amount of the judgment of the court and costs, with interest, is *prima facie* the measure of damages.[506]

§ 2744. **Suit on bond—Trial.**—In an action on a redelivery bond, if there is no evidence showing that the diminution in value of the goods from the date of their release to the date of their redelivery was three hundred and sixty dollars, an instruction that if the goods when they were redelivered were not in substantially the condition they were when released to the defendants plaintiff was entitled to a verdict of three hundred and sixty dollars should be refused.[507] The sum for which property sells at a sheriff's sale may be conclusive as to its value.[508]

500 Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306. See Witherspoon v. Cross, 135 Cal. 96, 67 Pac. 18.

501 Winton v. Myers, 8 Okla. 421, 58 Pac. 634.

502 Ballinger's Washington Codes, § 5262.

503 Hill v. Gardner, 35 Wash. 529, 77 Pac. 808.

504 McCarthy v. Boothe, 2 Cal. App. 170, 83 Pac. 175.

505 Schofield v. Territory, 9 N. Mex. 526, 56 Pac. 306.

506 Winton v. Myers, 8 Okla. 421, 58 Pac. 634.

507 Creswell v. Woodside, 15 Colo. App. 468, 63 Pac. 330.

508 Id.

§ 2745. Wrongful attachment—Parties liable.—While an officer is not ordinarily to be treated as the agent of a person who causes the levy of an attachment, yet where the attachment is illegally issued and served the officer is to be treated as acting for the person causing the levy, and the latter is liable for the wrongful levy.[509] An attaching creditor is liable for the act of a sheriff in levying on property not belonging to the debtor when, after notice of the claim of a third person to the property, he causes it to be sold, and receives the proceeds of the sale.[510]

§ 2746. Wrongful attachment—Pleadings and defense.—Where plaintiff has waived the question of malice as an element of damage for a wrongful levy of an attachment, the question as to defendant's relying on the advice of counsel in levying the attachment is immaterial, and the fact that other attachments were levied on the property of plaintiff at the time of the defendant's wrongful attachment is of no consequence.[511] The fact that before the trial of claim and delivery for chattels attached by the creditors of plaintiff's vendor the property was purchased by plaintiff at a sale under the judgment in the attachment suit did not estop him from asserting that the property was wrongfully attached.[512] The equities claimed for damages sustained on account of a wrongful issuance of an attachment in the action cannot be pleaded in the answer to the complaint in the original action.[513]

§ 2747. Wrongful attachment—Evidence.—In a suit for damages, by one claiming to be the real owner, for the selling of wool taken on attachment from another person, on a writ issued by a justice of the peace, the trial court properly excluded the question, "Was the sale of the wool published in a newspaper for a period of three weeks prior to the date of the sale?" as such publication was not material on the question whether the wool belonged to the plaintiff or to some other person.[514] In an action for wrongful seizure, defendant justified under an attachment

509 Gregory Grocery Co. v. Beaton, 10 Kan. App. 256, 62 Pac. 732.

510 Lee Mercantile Co. v. Chapman, 9 Kan. App. 374, 58 Pac. 125.

511 Gregory Grocery Co. v. Beaton, 10 Kan. App. 256, 62 Pac. 732.

512 Williams v. Borgwardt, 119 Cal. 80, 51 Pac. 15.

513 Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801; Veysey v. Bernard, 49 Wash. 571, 95 Pac. 1096.

514 Cevada v. Miera, 10 N. Mex. 62, 61 Pac. 125.

which was denied by the reply. At the time of the levy, plaintiff had a lease of the property attached, signed by the president of the lessor company. In such a case, evidence that after the attachment the lessor company ratified the lease was erroneously excluded on the ground that such ratification could not affect defendant's rights under the attachment, where no evidence had been offered by defendant to show a valid attachment.[515]

In an action for wrongful attachment, the inventory and appraisement made by the levying officer is competent evidence of the value of the goods.[516] Where one who has claimed attached property under the Oregon statute [517] withdraws his claim before verdict in the suit by claimant against the officer for conversion, it is presumed that the suit was commenced before attachment sale.[518] In an action for wrongful attachment, evidence of the publication of news of the attachment should not be admitted; but evidence of the release of defendant from liability should be admitted, as also the amount of business of the plaintiff and the injury to his credit.[519]

§ 2748. **Wrongful attachment—When the right of action arises.**—Where a sheriff levies an attachment on part of a stock of goods, and holds possession of all the goods, a right of action for conversion arises in favor of the owners, and the fact that other attachments are made on the remainder of the stock does not affect the right of the owners.[520]

§ 2749. **Wrongful attachment — Damages.**—Attorney fees paid to discharge an attachment wrongfully levied are a proper element of damages.[521] In an action to compel the delivery of personal property taken on attachment, there is no authority for the recovery of interest.[522]

§ 2750. **Wrongful attachment—Instructions.**—Where an attempted denial of the damages alleged to have been sustained

515 Columbia River etc. Nav. Co. v. Vancouver Transp. Co., 32 Or. 532, 52 Pac. 513.

516 Green v. McCracken, 64 Kan. 330, 67 Pac. 857.

517 Or. B. & C. Codes, § 231; Hill's Annot. Laws, § 288.

518 Singer Mfg. Co. v. Driver, 40 Or. 333, 67 Pac. 111.

519 Hayes v. Union Mercantile Co., 27 Mont. 264, 70 Pac. 975.

520 Burdge v. Kelchner, 66 Kan. 642, 72 Pac. 232.

521 Gregory Grocery Co. v. Beaton, 10 Kan. App. 256, 62 Pac. 732.

522 Hill v. Gardner, 35 Wash. 529, 77 Pac. 808.

by plaintiff for a wrongful attachment, on which the action was based, amounted to no more than a negative pregnant, an instruction to allow the same, if the verdict should be for plaintiff, was correct.[523]

§ 2751. **Garnishment.**—By the United States courts it has been held that a garnishment is a suit, and not a mere process of execution, and hence jurisdiction must appear by the pleadings.[524] The doctrine of garnishment, although partially regulated by statute, is not the less a common-law proceeding, and, therefore, in proceedings against a garnishee the parties are entitled to a jury trial.[525] It is a legal and not an equitable remedy, and applies only to cases where the legal, as distinguished from the equitable, relation of debtor and creditor exists between the defendant and the garnishee.[526] However, the remedy in garnishment is purely statutory, and to make it available the essential requisites of the statute must be complied with.[527]

§ 2752. **Persons liable to garnishment.**—All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections,[527a] shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts until the attachment be discharged or any judgment recovered by him be satisfied.[528]

The word "debt" as used in the law of garnishment includes only legal debts, or causes of action upon which the defendant in the attachment, under the common-law practice, can maintain an action of debt or *indebitatus assumpsit*, and not mere equitable claims.[529]

§ 2753. **Persons liable—Receivers.**—A receiver is liable to garnishment for the funds in his hands where the case in which

523 Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57.

524 Tunstall v. Worthington, Hempst. 662, Fed. Cas. No. 14239.

525 Cahoon v. Levy, 5 Cal. 294.

526 Hassie v. God Is With Us Cong., 35 Cal. 378; Case v. Noyes, 16 Or. 329, 19 Pac. 104.

527 Id.; Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

527a Cal. Code Civ. Proc., §§ 542, 543.

528 Cal. Code Civ. Proc., § 544.

529 Redondo Beach Co. v. Brewer, 101 Cal. 322, 35 Pac. 896. "Debts" and "credits" in garnishment law are

he was appointed has been settled or dismissed.[530] When a defendant has a right to certain distributive shares of a fund in the hands of a receiver, master in chancery, or trustee of the court, the officer may be effectually garnished by a creditor of the party so entitled after the court has ordered it to be paid, and the officer has nothing more to do with the fund than to pay it over.[531]

§ 2754. Persons liable—Mortgagees.—A mortgagee in possession, after the conditions are broken, before he has sold the property and satisfied his debt, can be garnished as one having property of the mortgagor, under the Kansas statute[532] providing that any creditor shall be entitled to proceed by garnishment against any person who shall be indebted to or have any property in his possession or under his control belonging to creditor's debtor.[533] A mortgagee of a crop is not entitled to a priority in the surplus proceeds of a sale of the crop as against garnishing creditors of the mortgagor.[534]

§ 2755. Persons liable—Public officials.—The liability of a city for the salary of a public officer fixed by law is not a debt or a right arising out of a contract, express or implied, and subject to garnishment. Nor is it subject to garnishment in Colorado under the statute[535] making municipal corporations subject to garnishment, on the ground that public policy demands the best service of public officers, which it is presumed would be impaired by garnishment.[536] Section 710 of the Code of Civil Procedure of California applies to legislative officers, making their salaries liable to the payment of their debts.[537] The same section provides a remedy for the collection of debts owing from a city, county, or state officer, by first securing judgment against such debtor and filing the same with the auditor, secretary, or clerk whose duty it is to pay or draw warrants for the salary of such judgment debtor,

clearly distinguished in Gow v. Marshall, 90 Cal. 565, 27 Pac. 422.

530 Russell & Co. v. Millett, 20 Wash. 212, 55 Pac. 44.

531 Dunsmoor v. Furstenfeldt, 88 Cal. 522, 22 Am. St. Rep. 331, 26 Pac. 518, 12 L. R. A. 508.

532 Gen. Stats. 1897, ch. 95, §§ 227, 228.

533 Swofford Bros. v. Brittain Dry Goods Co., 9 Kan. App. 1, 57 Pac. 235.

534 Gates v. Tom Quong, 3 Cal. App. 443, 85 Pac. 662.

535 Sess. Laws, 1891, p. 234.

536 Troy Laundry etc. Co. v. City of Denver, 11 Colo. App. 368, 53 Pac. 256.

537 Ruperich v. Baehr, 142 Cal. 190, 75 Pac. 782.

who must then pay the amount, or so much as is due the debtor from the city, county, or state, into the court from which the judgment issued, in satisfaction of all or a part of the said judgment. In the absence of a statute authorizing suit against the state, garnishment cannot be maintained against the secretary of state to attach funds; and the repeal of a provision that state officers shall not be liable to garnishment does not of itself authorize the process.[538]

A board of education duly incorporated under the laws of Utah is a public or municipal corporation, and is not liable to garnishment for salary due a teacher, under the statute authorizing garnishment of corporations.[539]

§ 2756. **Persons liable—Plaintiffs.**—Under a statute providing that proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all the provisions for enforcing judgments shall be applicable thereto, plaintiff in an action can neither summon nor charge himself as garnishee therein.[540]

§ 2757. **Persons liable—Officers of a court.**—The Washington statute of 1886[541] which authorizes garnishment of a sheriff or constable for money of the defendant in his hands was not repealed by the session laws (p. 95) of 1893.[542]

Where a United States district court in California, having seized and sold, to pay maritime claims, a vessel belonging to a receiver appointed by the court of another state, intends to return the surplus, and the jurisdiction to determine conflicting claims to it, to the state court, and, in compliance with its decree, its clerk prepares checks to mail to the receiver according to his direction, the latter is, in effect, an officer of the federal court in the transmission of the fund; and hence garnishment will not lie against the clerk to subject the fund to other debts, on the theory that there was a delivery to the receiver, and that the federal court had parted with its control.[543]

538 Keene v. Smith, 44 Or. 525, 75 Pac. 1065.

539 Chamberlain v. Watters, 10 Utah, 298, 37 Pac. 566.

540 First Nat. Bank v. Elliott, 62 Kan. 764, 64 Pac. 623, 55 L. R. A. 353.

541 Laws 1886, p. 43, § 19; Ballinger's Wash. Codes, § 5367.

542 Pierce v. Commercial Ins. Co., 30 Wash. 272, 70 Pac. 496.

543 Swinnerton v. Oregon Pacific R. Co., 123 Cal. 417, 56 Pac. 40.

The garnishee, a chief of police, by search made under a prisoner's directions, came into possession of money belonging to such prisoner, with his consent; such money not being taken at the time of the arrest, nor from the person of the prisoner, and having no connection with the cause of arrest, was not *in custodia legis* so as to exempt it from garnishment.[544] Where a justice of the peace, without statutory authority, accepts money in lieu of bail for appearance of B., the money belonging to F., and being deposited by him, and the justice receipting to him therefor, F., on discharge of B., is entitled to the money free from any right of B.'s creditors to subject it to garnishment.[545]

A judgment debt is not subject to garnishment by process from a court other than that from which, or in which, the judgment was rendered.[546]

§ 2758. Persons liable—Lessee.—Property in possession of a lessee under a lease from a debtor cannot be reached by garnishment during the term of the lease, and no authority is conferred upon the court, where the lessee has been summoned as garnishee, to continue the garnishment proceedings until the lease has expired, and then order lessee to deliver the property to the officer.[547] Where a judgment creditor garnishes a mortgagee of personal property of the debtor, any excess of goods in the mortgagee's possession over an amount adequate to secure him may be required to be applied to the payment of the judgment.[548]

§ 2759. Persons liable—Bank of safety-deposit.—The garnishee had rented to the defendant a compartment in its safety-deposit vaults. Before it could be opened the bank had to turn in the lock what is known as a "master key," after which the keys furnished defendant would unlock the compartment, and the bank had no key whatever that would do so. In such a case the bank could put it within the power of defendant to remove the contents of the box, and thus had control of the contents of the box within the meaning of the code provision, that, should it appear from the garnishee's answer that he has in his control

544 Coffee v. Haynes, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482.

545 McAlmond v. Bevington, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597.

546 Hamill v. Peck, 11 Colo. App. 1, 52 Pac. 216.

547 Drake v. Catlin, 18 Wash. 316, 51 Pac. 396.

548 Wingrove v. Haines, 7 Kan. App. 269, 53 Pac. 881.

any personal property of the defendant liable to execution, a decree shall be rendered requiring the garnishee to deliver to the sheriff, on demand, such property, or so much as may be necessary to satisfy plaintiff's claim.[549]

§ 2760. **Persons liable—Assignees.**—Where a sale is made in good faith, and not with a fraudulent purpose, although but a part of the price has been paid, the seller has no attachable interest in such property, but the remedy of his creditors is by garnishment of the debt due for the unpaid balance.[550] The sheriff cannot garnish a transferee of personal property capable of manual delivery under a conveyance that was fraudulent as to creditors. The proper remedy is to attach the property.[551]

Where defendant pleads a settlement made subsequent to the beginning of plaintiff's suit, in which plaintiff agreed to take a sum less than the amount sued for, it could not be said to be a contingent liability, and therefore not reachable by garnishment, and it was error to exclude testimony that defendant had settled the account for the lesser amount by payment to the sheriff, under an execution against plaintiff after he had filed his answer.[552]

Where on being served with garnishment in an action by the materialman against a subcontractor, the contractor pays that amount over to the sheriff, the plaintiff has no further claim against him; but the plaintiff cannot get the money in the hands of the sheriff until he has secured a judgment against the defendant subcontractor.[553]

Property or debts transferred by a defendant in attachment may be garnished, although the defendant in attachment could not recover them himself.[554]

§ 2761. **Extent of liability of garnishee.**—As a general rule, a garnishee is only liable where the defendant or the judgment debtor might have maintained an action against him.[555] He

549 Trowbridge v. Spinning, 23 Wash. 48, 83 Am. St. Rep. 806, 62 Pac. 125, 54 L. R. A. 204.

550 McFadyen v. Masters, 8 Okla. 174, 56 Pac. 1059.

551 Wilson v. Harris, 19 Mont. 69, 47 Pac. 1101.

552 Barr v. Warner, 38 Or. 109, 62 Pac. 899.

553 Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. 442.

554 Van Ness v. McLeod, 3 Idaho, 439, 31 Pac. 798.

555 Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

cannot be placed in a worse position than if the defendant's claim was enforced by the defendant himself.[556] The garnishee stands as nearly as possible in the same position he would occupy if sued at law by the creditor.[557] The court may enter judgment against the garnishee where he has disposed of the property in his possession after the service of the writ on him.[558]

It being proved that the garnishee was not liable, the fact that he had tried to avoid the effect of the attachment was of no avail to the plaintiff.[559] A garnishment summons served on one in his individual capacity does not bind any property or money held by him as a receiver.[560] Where the garnishee holds property as a pledge, he should, after sale of the same, turn over to the judgment creditor the balance above the amount of the pledge.[561]

§ 2762. **Beginning of the liability of garnishee.**—The liability of a garnishee dates from the service of the attachment and affidavit, and not from the notice to appear.[562] Where B. was garnished in a suit against C., the day before he accepted an order drawn by A. in favor of C., but failed to inform B. thereof, and C., for a valuable consideration, sold the order, as indorsed, to D., an innocent purchaser, it was held that B., having made the order negotiable, and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D. for the full amount thereof.[563]

§ 2763. **Notice and liability of garnishee.**—A notice of the attachment of the credits and effects belonging to the defendant in the attachment suit creates no liability of the garnishee for a debt due the defendant.[564] In trying to prove the sufficiency of notice to a garnishee, the fact that the garnishee refused to pay the defendant debtor because the account had been attached cannot be used, but a pencil entry on the account-book, the state-

556 Universal Fire Ins. Co. v. Tabor, 16 Colo. 531, 27 Pac. 890; Sauer v. Town of Nevadaville, 14 Colo. 54, 23 Pac. 87.

557 Field v. Sammis, 12 N. Mex. 36, 73 Pac. 617.

558 Eidemiller v. Elder, 32 Wash. 605, 73 Pac. 687.

559 Cowell v. May, 26 Mont. 163, 66 Pac. 843.

560 Fleming v. Gillespie, 7 Okla. 430, 54 Pac. 653.

561 Cooley v. Janes, 71 Kan. 297, 80 Pac. 596.

562 Johnson v. Carry, 2 Cal. 33.

563 Garwood v. Simpson, 8 Cal. 101.

564 Clyne v. Easton etc. Co., 148 Cal. 287, 113 Am. St. Rep. 253, 83 Pac. 36.

ment of the president that the account was attached, and a refusal to pay it over to the defendant is evidence, though not conclusive evidence, of the attachment of the debt.[565]

Where the principal defendant is a non-resident of the state, service by publication is sufficient on which to base a garnishment.[566] The assent of an ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the sheriff, who holds an execution against a third party, in levying it upon property in the possession of the principal in her absence.[567]

A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property and bring suit for the value of the property against the garnishee.[568] A garnishment served upon the owner, in a suit against the head contractor after the commencement of a building, and before notice served, must prevail over the lien of a subcontractor.[569]

§ 2764. Service of notice of garnishment.—The delivery to a garnishee of a copy of the writ of attachment together with a notice to the effect that the officer thereby "attached all debts, property, money, rights, dues, and credits of every nature in his hands or under his control," is a valid garnishment, and sufficiently specifies the property attached.[570] The order provided for in sections 150 and 160 of the Oregon Code of Civil Procedure is process, and must be served on the garnishee personally, service upon his attorney being insufficient. If, however, it appears that such garnishee voluntarily appeared in person and by attorney at the hearing of such order, that appearance is equivalent to personal service.[571] In order to bind a creditor whose claim is sought to be appropriated by means of garnishment proceedings, it is essential that there be service of process

565 Clyne v. Easton etc. Co., 148 Cal. 287, 113 Am. St. Rep. 253, 83 Pac. 36.

566 Holford v. Trewella, 36 Wash. 654, 78 Pac. 308.

567 Fitch v. Brockmon, 2 Cal. 575.

568 Roberts v. Landecker, 9 Cal. 262.

569 Cahoon v. Levy, 6 Cal. 295, 65 Am. Dec. 515. But see Cal. Code Civ. Proc., § 1186; Barber v. Reynolds, 44 Cal. 519.

570 Carter v. Koshland, 12 Or. 492, 8 Pac. 556.

571 Id.; Case v. Noyes, 16 Or. 539, 21 Pac. 46; Smith v. Conrad, 23 Or. 211, 31 Pac. 398.

or its equivalent, and he will not be bound by an independent submission of his rights by his debtor.[572]

A garnishment summons served on one in his individual capacity does not bind any property or money held by him as a receiver.[573] A lien on personal property capable of manual delivery is not acquired by garnishment of the holder of it under a fraudulent transfer, but it must be taken into custody.[574]

§ 2765. Priorities between garnishments and other liens or claims.—The attachment of a bank account takes precedence of an unpresented check drawn on a part of the account.[575] Subsequent attaching creditors, if not made parties plaintiff in a prior attachment, are not entitled to the protection of the statute in consolidation of causes and discharge of sequestered property, but must give way to intervening claimants purchasing intermediate between the two suits.[576]

Where the claim to a surplus arising from a sale of property under a deed of trust was based on a contract calling for a conveyance of the land, which was recorded prior to the bringing of a suit in which such surplus was garnished, the record of such contract was notice of any right in the land acquired thereunder, and such claim was superior to that acquired by the garnishment.[577]

§ 2766. Claims by third parties.—If the garnishee has knowledge of the claims of third parties, he should disclose the same in his answer, that such third parties may be interpleaded.[578] A third party may intervene in a garnishment arising under execution.[579] A claimant of money garnished can protect himself by notifying the garnishee, who can likewise protect himself by disclosing the claim in his answer, whereupon a receiver or the plaintiff can proceed by action to determine the garnishee's liability.[580]

572 Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024; Hebel v. Amazon Ins. Co., 33 Mich. 400.

573 Fleming v. Gillespie, 7 Okla. 430, 54 Pac. 653.

574 Wilson v. Harris, 19 Mont. 69, 47 Pac. 1101; Wyman v. Jensen, 26 Mont. 227, 67 Pac. 114.

575 Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 94 Am. St. Rep. 28, 71 Pac. 93.

576 Hendrie & Bolthoff Mfg. Co. v. Collins, 29 Colo. 102, 67 Pac. 164.

577 American Nat. Bank v. Barnard, 15 Colo. App. 110, 61 Pac. 200.

578 Rock Island Lumber Mfg. Co. v. Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024.

579 Field v. Sammis, 12 N. Mex. 36, 73 Pac. 617.

580 Schloredt v. Boyden, 9 Wyo. 392, 64 Pac. 225.

Telegraphing to the defendant, and agreeing to hold the property in behalf of defendant's creditors, is inadmissible as against a purchaser from such defendant who interpleads in the garnishment proceedings, and the garnishee is held for the value of the goods.[581] A claimant to money garnished cannot intervene and be made a party in an action to which the garnishment is auxiliary;[582] nor can such claimant intervene in the garnishment proceedings and obtain an adjudication of his claim therein, since there is no authority therefor in the statute, but error in permitting him to file a petition of intervention and give evidence in support thereof is waived by a failure to object thereto.[583]

A debtor and his wife testified that money garnished was proceeds of cattle which he had transferred to her for a valuable consideration, and that they were kept in his pasture as before till he sold them as her agent. It was held to be sufficient to sustain a finding that the money belonged to her, though he did not reveal the actual ownership in his dealings with the garnishee.[584]

§ 2767. **Liability—Notice to third party.**—A garnishee can only be required to answer as to his liability to the debtor or defendant at the time of the service of the garnishment.[585] Only debts due or those which, by virtue of a contract, existing at the time of the service of the garnishment summons on garnishee, are to become due, and the property belonging to the debtor then in the garnishee's possession, are impounded by garnishment.[586] Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be rendered for the amount he admits to be due.[587] If he certifies that he has no property, etc., the certificate may be impeached.[588]

§ 2768. **Appearance of garnishee.**—The provisions of the statute authorizing this proceeding were intended for the security

581 Hendrie & Bolthoff Mfg. Co. v Collins, 29 Colo. 102, 67 Pac. 164.

582 Stanley v. Foote, 9 Wyo. 335, 63 Pac. 940.

583 Schloredt v. Boyden, 9 Wyo. 392, 64 Pac. 225.

584 Id.

585 Norris v. Burgoyne, 4 Cal. 409.

586 Fleming v. Baxter, 20 Colo. 238, 38 Pac. 57.

587 Cahoon v. Levy, 4 Cal 244.

588 Hopkins v. Snow, 4 Abb. Pr. 368; Carroll v. Finley, 26 Barb. 61. For the requisites of the sheriff's no-

of the plaintiff, and not to confer a privilege upon the garnishee; and the plaintiff may or may not, at his election, require the garnishee to appear and answer on oath, and his liability will not be affected by the failure of the plaintiff to take such a step.[589] Section 545 of the California Code of Civil Procedure refers to persons owing debts to, or having possession of personal property belonging to, the defendant in an attachment suit.[590] And the provision to the effect that defendant may also be required to attend for the purpose of giving information respecting his property does not look to the entry of an order directing him to surrender property in his own possession, but merely to give such information under oath or otherwise, as will facilitate the examination of a garnishee under examination.[591]

§ 2769. **Appearance of garnishee a waiver of defective notice.**—Where a garnishee appears and answers, and proceeds to the hearing in the trial court, without making any objection to the sufficiency of the affidavit on which citation issued, he waives any objection to its sufficiency.[592] Since proceedings instituted against a garnishee when his certificate is unsatisfactory are personal to himself, he may waive service of the written allegations and interrogatories by a voluntary appearance, though he cannot waive service of the original writ.[593]

Where a summons in garnishment is not addressed to the garnishee, does not give the cause in which it is issued, does not notify the garnishee that he is required to appear or answer on or before the date of the return day according to law, does not direct him to file a copy of his answer with the clerk, and in other respects does not follow the form as provided by statute, it is void, and an answer and appearance by the garnishee will not waive such defects; and if the principal defendant in the case is a non-resident, and makes no appearance, the court does not have any jurisdiction of the case at all.[594]

§ 2770. **Jurisdiction in general.**—A provision requiring actions to be tried in the county of defendant's residence does not

tice to third persons of the attachment, see Kuhlman v. Orser, 5 Duer, 242, Wilson v. Duncan, 11 Abb. Pr. 3.

589 Roberts v. Landecker, 9 Cal. 262.

590 Ex parte Rickleton, 51 Cal. 316.

591 Id.

592 Coffee v. Haynes, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482.

593 Altona v. Dabney, 37 Or. 334, 62 Pac. 521.

594 Phœnix Bridge Co. v. Street, 9 Okla. 422, 60 Pac. 221.

apply to garnishment proceedings.[595] Section 140 of the Colorado code provides that the garnishment statutes be liberally construed, but this applies only to the remedy after jurisdiction has attached, and does not extend jurisdiction by implication, since the statute is in derogation of the common law.[596]

Where garnishment proceedings are resorted to after judgment, in order to give validity to the proceedings, there must be a valid execution issued and outstanding on the judgment at the time of the issuance and service of the summons in garnishment.[597]

§ 2771. Jurisdiction of person of defendant.—An appearance by the principal defendant in garnishment, in order to have his money adjudged exempt, is general, and gives the court jurisdiction of both his person and the subject-matter of the garnishment.[598] There must be an execution returned unsatisfied before garnishment can be had against the creditor of a judgment debtor of the plaintiff.[599]

§ 2772. Jurisdiction of the property or debt.—Plaintiff, a resident of Arizona, sued on an insurance policy, and defendant pleaded that, after receipt of plaintiff's proof of loss, plaintiff had been sued in California by creditors there, service being had by publication, and that funds for the payment of plaintiff's claim in the hands of defendant's general agent in California were garnished, and thereafter, under the garnishment proceedings, paid by defendant to plaintiff's creditors. As plaintiff's claim against defendant would sustain an action *in rem* against plaintiff, and as defendant had funds in California which plaintiff could have attached in an action on his policy in that state, the *situs* of the debt was there for the purpose of garnishment, and defendant's payment under the garnishment was a defense to plaintiff's action in Arizona.[600] The same person may be garnished in both a state and a federal court at the same time,

595 Title Guarantee etc. Co. v. Northwestern Theatrical Assoc., 23 Wash. 517, 63 Pac. 212.

596 Troy Laundry etc. Co. v. City of Denver, 11 Colo. App. 368, 53 Pac. 256.

597 Hutchinson v. Nelson, 63 Kan. 327, 65 Pac. 670.

598 Kansas City etc. Ry. Co. v. Cunningham, 7 Kan. App. 47, 51 Pac. 972.

599 Matteson etc. Mfg. Co. v. Conley, 144 Cal. 483, 77 Pac. 1042.

600 National Fire Ins. Co. v. Ming, 7 Ariz. 6, 60 Pac. 720.

but the state court may require him to account for only the balance left from the federal judgment.[601]

§ 2773. **Writ or summons of garnishment.**—Under the Oklahoma statute, the leaving of a copy of the writ of garnishment summons is a good and sufficient service.[602] Where a debt due the defendant was levied on under execution, the fact that the notice served on the garnishee stated that the money had been attached was immaterial, and such garnishee was rendered personally liable to the plaintiff for the amount of the debt, though it might have been otherwise had it been personal property in his possession instead of a debt due.[603]

Where an invalid summons is served on the garnishee, instead of the garnishment notice required by the statute, and such summons is subsequently quashed, and plaintiff abandons further proceedings thereunder, it does not operate as a notice to the garnishee so as to hold him liable for property surrendered to defendant previous to the institution of a new proceeding.[604]

§ 2774. **Citation to garnishee.**—Persons owing debts to the defendant, or having in possession or under their control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same.[605]

§ 2775. **Time for making answer by garnishee.**—Though garnishment proceedings must be conducted in substantial conformity to the statute, an order of court, made by agreement of the parties, indefinitely extending the statutory time for filing an answer does not deprive the court of jurisdiction.[606] A garnishee has a right to interpose an answer.[607]

601 McCord-Brady Co. v. Mills, 8 Wyo. 258, 56 Pac. 1003, 46 L. R. A. 737.

602 Theison v. Brown, 11 Okla. 118, 65 Pac. 925.

603 Barr v. Warner, 38 Or. 109, 62 Pac. 899.

604 Henkle v. Bi-Metallic Bank, 13 Colo. App. 410, 58 Pac. 336.

605 Cal. Code Civ. Proc., § 545. See, also, Alaska Codes, pt. 4, ch. 14, § 156; Ariz. Civ. Code, pars. 2586, 2587; Idaho Rev. Codes, § 4310; Mont. Rev. Codes, § 6668; Nev. Comp. Laws, § 3226; Or. B. & C. Codes, § 304; Utah Rev. Stats., § 3091; Wash. Bal. Codes, §§ 5363, 5392.

606 Potter v. Northrup Banking Co., 59 Kan. 455, 53 Pac. 520.

607 Shorey v. Rennell, 1 Sprague, 418, Fed. Cas. No. 12807.

§ 2776. **Sufficient answer of garnishee.**—An answer of a garnishee, alleging that it is a municipal corporation; that the only money owed by it to the defendant is on account of his salary as a public officer; and that it is not subject to garnishment for such salary, is sufficient to raise its privilege of exemption.[608] An answer of a garnishee that he is in possession of goods of defendant under a chattel mortgage, and that at the time of the summons he is engaged in selling the goods to satisfy the debt which the mortgage secures, is in effect a denial that the garnishee has defendant's goods in his possession.[609] The defense of payment need not be alleged affirmatively in garnishee's answer, but may be shown under a general traverse.[610]

§ 2777. **Insufficient answer of garnishee.**—Where the answer of the garnishee shows an indebtedness on a note, and does not show that the note is negotiable, a judgment against the garnishee is not void, and is enforceable the same as any other judgment.[611] The answer of a garnishee which simply denies *in hæc verba* the allegations of the complaint does not raise an issue, and the complaint will be taken to be confessed, and judgment will be rendered against the garnishee, where it appears that such a denial is made deliberately.[612]

§ 2778. **Amended answer.**—Courts allow a garnishee to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided.[613] Where a garnishee alleges that he holds the property by assignment for the benefit of creditors, he may amend the answer to allege that plaintiff consented to the assignment.[614]

§ 2779. **Making a reply.**—Under the Colorado statute, the garnishee has no opportunity to plead to a reply, but without pleading he can avail himself of any defense he may have to the new matter set up therein.[615]

608 Troy Laundry etc. Co. v. City of Denver, 11 Colo. App. 368, 53 Pac. 256.

609 Bragdon v. Bradt, 16 Colo. App. 65, 64 Pac. 248.

610 Robertson v. Robertson, 37 Or. 339, 82 Am. St. Rep. 756, 62 Pac. 877.

611 Hardware Co. v. Klippert, 67 Kan. 743, 74 Pac. 254.

612 Dawson v. Maria, 15 Or. 556, 16 Pac. 413.

613 Smith v. Brown, 5 Cal. 118.

614 McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77.

615 Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

§ 2780. **Answer of partner.**—The rule that where a partner is sued individually for a firm debt he is usually required to plead the nonjoinder of his copartners, in order that he may avail himself of this defense, has no application to garnishment proceedings under the Colorado practice.[616]

§ 2781. **Defense of garnishee.**—While a garnishee may plead judgment, he cannot plead in bar the pendency of garnishment proceedings against him in defense of a suit brought by his immediate creditor.[617] Where defendant purchased a stock of goods in a building without complying with the statute regarding sales in bulk, it is no defense that at the time of garnishment defendant was not indebted to the seller of the goods, and had none of the goods in his possession; and if the goods are of greater value than the amount due vendor's creditor, it is immaterial that the value of the goods at the time they were disposed of by the vendee is not shown.[618]

§ 2782. **Affidavit in garnishment.**—In garnishment proceedings supplementary to execution, it is unnecessary that the affidavit filed as a basis for the order summoning a garnishee should state that execution had been issued against the debtor.[619]

§ 2783. **Discharge of garnishee.**—Where a party is garnished to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and a term elapses without any action on the garnishment, the summons is discontinued and the party discharged from liability to answer.[620] Where a garnishee, in discharge of a rule, answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court without further delay, unless his answer is controverted by the affidavit of the plaintiff.[621]

616 Jones v. Langhorne, 19 Colo. 206, 34 Pac. 997.

617 Herlow v. Orman, 3 N. Mex. 291 (471), 6 Pac. 935.

618 Kohn v. Fishback, 36 Wash. 69, 104 Am. St. Rep. 941, 78 Pac. 199.

619 Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004. See, also, Walker v. Columbus State Bank, 64 Kan. 884, 67 Pac. 552. For an example of an affidavit by plaintiff sufficient to raise an issue on the answer of garnishee denying possession of the goods belonging to defendant, see McDaniels v. Connelly Shoe Co., 30 Wash. 549, 94 Am. St. Rep. 889, 71 Pac. 37, 60 L. R. A. 947.

620 Ogden v. Mills, 3 Cal. 253.

621 Id.

Judgment against defendant discharges the indebtedness of a garnishee on paying the full amount thereof into court.[622]

§ 2784. **Other actions pending.**—A garnishee cannot plead the pendency of the attachment suit in abatement of an action subsequently brought against him by the debtor in the attachment. Nor can he safely pay his creditor, the debtor in the attachment, so long as proceedings by attachment are in force. The proper course is for the court to order a suspension of the action against the garnishee by his creditor until the attachment proceedings are disposed of.[623]

The fact that the defendant in an action for the recovery of money has been garnished by a creditor of the plaintiff constitutes no defense to the action, and cannot be set up in the answer as a plea in bar. The remedy of defendant is by motion, based upon affidavit of the fact, for stay of proceedings until the action against the plaintiff or the attachment therein is disposed of.[624] When property is taken from the possession of the defendant by the officer levying thereon, it is sufficient to introduce in evidence the attachment or execution under which the levy is made; but when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment or prove the debt for which judgment is demanded in the attachment suit.[625]

§ 2785. **Proceeds of a mining claim.**—The defendant, some time previous to the suit of the plaintiff against the R. S. Mining Company, sued the company and obtained judgment against it by default. The judgment was made to draw a certain rate of interest, without there being any prayer for such relief in the complaint. It was erroneous in certain other respects. On appeal to the supreme court, the judgment was modified by striking out certain clauses, and in certain other respects. There was no stay of proceedings in the court below, and before the decision of the case by the supreme court the defendant had taken out an execution, and caused the mining claims of the R. S. Mining Company to be sold. At the sale the defendant bid the full sum for which his exe-

622 Taney v. Vallenweider, 28 Mont. 147, 71 Pac. 415.

623 McFadden v. O'Donnell, 18 Cal. 160.

624 McKeon v. McDermott, 22 Cal. 667, 83 Am. Dec. 86.

625 Sexey v. Adkinson, 34 Cal. 346, 91 Am. Dec. 698.

cution called and became the purchaser. He paid the sheriff no money except his fees on the execution, but gave him a receipt, as is usual in such cases, for the sum equal to the face of the execution, less the fees paid to the sheriff. The R. S. Mining Company had ceased to work its mine prior to this sale. After the sale a contract was made between the defendant and the company, by which the latter agreed to work the mine during the time allowed for the redemption and pay over proceeds to the defendant, and the latter agreed to pay all the expenses of working, and to pay the company wages in any event, whether the mine should yield a profit or not. Under this contract the defendant received from the mine, over and above expenses, the sum of seven thousand dollars in gold-dust. Plaintiff, as an attaching creditor of the R. S. Mining Company, brought suit against the defendant as garnishee; and it was held that the case presented failed to make the defendant a debtor of the company within reach of plaintiff's attachment.[626]

§ 2786. **Trust funds.**—Where A., who carried on a printing-office, was indebted to the hands of the office, and he placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do; and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B., at the suit of C. against A., it was held that the money was liable to the attachment.[627] The equitable remedy given a beneficiary to follow trust funds is not taken away by the statutory provision giving a remedy by attachment and garnishment.[628]

§ 2787. **Evidence—Presumptions and burden of proof.**—To justify a recovery against a garnishee, it must be shown affirmatively by the answer or by the evidence, that at the time of service of the garnishment summons he had property of the defendant in his possession of a description which will authorize his being charged, or that he was indebted to the defendant.[629] The credi-

626 Johnson v. Lumping, 34 Cal. 293.

627 Chandler v. Booth, 11 Cal. 342; see Timm v. Stegman, 6 Wash. 14, 32 Pac. 1004.

628 Chaves v. Myer, 13 N. Mex. 368, 85 Pac. 233.

629 Drake on Attachment, § 461; Fleming v. Baxter, 20 Colo. 238, 38 Pac. 57.

tor who seeks to obtain judgment is required to establish affirmatively the liability of the garnishee; and where judgment is rendered against a garnishee without affirmative proof of his indebtedness, it will be set aside.[630] Where F. deposits, with a justice of the peace, money in lieu of bail for appearance of B., and the justice receipts therefor to F., the presumption in garnishment by B.'s creditors is that it is F.'s money.[631]

The burden of establishing the liability of the garnishee is upon the plaintiff, and the garnishee may plead any defense or set-off he might if the suit were brought directly against him, such as jurisdictional defenses.[632]

§ 2788. **Weight and sufficiency of evidence.**—A finding that no payment was made to the principal defendant by the garnishee before garnishment is proper when the evidence shows that the payment is a sham, or a mere paper transaction for the purpose of manufacturing evidence.[633] If a garnishee receipts for the property of the judgment debtor, delivered to him by the sheriff, he is estopped from showing that the property had never been in the hands of the sheriff, or that the sheriff had never levied on it.[634] A demurrer to evidence should be sustained in the absence of proof of a judgment against the principal debtor.[635]

§ 2789. **Admissibility of evidence.**—On a motion made to dismiss garnishment, proof that the contract was supported by a consideration was admissible, though no consideration was alleged, on the grounds that defendant claimed to have settled in full for a less amount.[636] A warehouseman, garnished, certified that he had certain grain of the defendant, and afterwards learned that the receipt for same was transferred. But he is not required to amend his certificate or notify plaintiff, nor is he estopped from showing that the negotiable receipt has been

630 Union Pacific Ry. Co. v. Gibson, 15 Colo. 299, 25 Pac. 300; Richards v. Stephenson, 99 Mass. 311.

631 McAlmond v. Bevington, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597.

632 Tabor v. Bank of Leadville, 35 Colo. 1, 83 Pac. 1060.

633 Altona v. Dabney, 37 Or. 334, 62 Pac. 521.

634 Colbath v. Hoefer, 43 Or. 366, 73 Pac. 10.

635 Levis-Zukoski Mercantile Co. v. Exchange Nat. Bank, 63 Kan. 550, 66 Pac. 638.

636 Hanson v. McCann, 20 Colo. App. 43, 76 Pac. 983.

transferred.[637] A garnishee is not prejudiced by the refusal to admit evidence to the effect that a plea of insanity had been interposed on behalf of the defendant, owner of the property in garnishee's possession, since the plea was not sustained.[638] The judge should take judicial notice of the fact that an execution had been issued in his own court, and it should be unnecessary to make proof of the fact by affidavit.[639]

§ 2790. **Trial of issues between plaintiff and garnishee.**—Under laws providing that if the answer of a garnishee is controverted it shall be tried as other cases, on change of venue of the main action on motion of defendant, the garnishment proceedings are properly removed with the main action, and the garnishee, having answered and waived a jury, cannot object that the proceedings on his answer are not tried in the county of his residence.[640] Where there is no evidence to show a debt, but the garnishee has shares of stock in his possession as trustee, no money verdict can be returned by a jury.[641]

§ 2791. **Judgment against garnishee.**—In proceedings against a garnishee, it is the duty of the court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor. An order requiring a garnishee to pay into the court the amount for which judgment has been rendered against him may be considered as improper.[642] Where money paid into court by a garnishee is, on appeal, ordered to be paid to an intervener, a personal judgment for the amount of the garnished fund may not be entered against plaintiff.[643]

A judgment rendered against a garnishee who has answered to a void garnishee summons in an action against a non-resident, who has not been personally served or appeared, is void, and should be set aside on motion.[644] A sheriff's return reciting that the garnishee was indebted to the defendant in attachment to an amount in excess of plaintiff's judgment does not give the

637 Adamson v. Frazier, 40 Or. 273, 66 Pac. 810, 67 Pac. 300.

638 Coffee v. Haynes, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482.

639 Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004.

640 Title Guarantee etc. Co. v. Northwestern Theatrical Assoc., 23 Wash. 517, 63 Pac. 212.

641 Williamson v. Oklahoma Nat. Bank, 7 Okla. 621, 56 Pac. 1064.

642 Smith v. Brown, 5 Cal. 118; Brummagim v. Boucher, 6 Cal. 16.

643 Stacher v. Rockhill, 7 Kan. App. 491, 54 Pac. 286.

644 Phœnix Bridge Co. v. Street, 9 Okla. 422, 60 Pac. 221.

court jurisdiction to enter judgment against the garnishee for an amount sufficient to pay plaintiff's judgment, where such garnishee had never appeared or been otherwise made a party to the action.[645] Whether a garnishee admits indebtedness or not, he is not a party to the original action so that a judgment can be rendered against him therein.[646]

§ 2792. **Effect of a judgment against garnishee.**—A judgment and satisfaction against a garnishee will be conclusive against persons claiming the funds of whom the garnishee had no knowledge, and against persons with knowledge of the garnishment, who did not interplead; but not against those known by the garnishee who did not disclose their claims.[647]

Where a buyer knew that the wife of the seller was the owner of the article purchased, his admission, in a certificate of garnishment in a suit against the husband, of indebtedness to the husband thereon, with the subsequent entry of judgment against him on account of such admission, does not relieve him from liability to the wife for the price, though her husband had signed the contract of sale.[648]

§ 2793. **Quashing writ of garnishment.**—Where a note was, pursuant to decree, transferred to a receiver, and subsequently a creditor of the insolvent sued and garnished the makers of said note, the writ of garnishment will not be quashed on motion of the insolvent, since its interest is identical with the receiver's, and any defense to the garnishment may be made in connection with that of the garnishee.[649] A notice of garnishment may not be invalidated on account of a misnomer of the corporation garnished.[650]

§ 2794. **Liability on bond or undertaking.**—The damages for which a surety on a bond in garnishment is liable are such as directly and necessarily arise from the wrongful seizure of the property, and cannot be remote and speculative; and one who

645 Broadway Ins. Co. v. Wolters, 128 Cal. 162, 60 Pac. 766.

646 Adamson v. Frazier, 40 Or. 273, 66 Pac. 810, 67 Pac. 300.

647 Rock Island Lumber Mfg. Co. v. Fourth Nat. Bank, 63 Kan. 768, 66 Pac. 1024.

648 Mullaney v. Evans, 33 Or. 330, 54 Pac. 886.

649 Prussian Nat. Ins. Co. v. Northwest Fire etc. Ins. Co., 19 Wash. 281, 53 Pac. 158.

650 Donohoe-Kelly Banking Co. v. Southern Pacific Co., 138 Cal. 183, 94 Am. St Rep. 28, 71 Pac. 93.

does not appeal from a judgment rendered against him in which garnishment is sustained, cannot maintain suit on the bond in garnishment for damages sustained by reason of the wrongful issuance and service of the garnishment summons. Where defendant had no interest in the fund and could have suffered no loss by the proceedings, his damage is too remote and speculative.[651] The sheriff has no authority to accept an undertaking for the release of money garnished, nor to execute a release for money in the hands of a garnishee, such property not being "in the hands of the sheriff," within the meaning of sections 111 and 112 of the Colorado code. But where parties, through the instrumentality of an undertaking executed by them, procure money from the garnishee, they, having thus received the benefit of the undertaking, cannot be heard to deny its binding obligation upon themselves, upon the happening of the contingencies therein provided for.[652]

FORMS IN ATTACHMENT.

§ 2795. Affidavit for attachment against resident.

Form No. 730.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says, as follows:

I. I am the plaintiff in the above-entitled action [or if an agent or officer of the plaintiff, state the capacity.]

II. The defendant in the said action is indebted to me in the sum of . . . dollars, lawful money of the United States, over and above all legal set-offs or counterclaims, upon an express [or, implied] contract for the direct payment of money, to-wit, [state contract briefly], and that such contract was made and is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property.

III. That the said attachment is not sought, and the said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the said defendant.

[JURAT.] [SIGNATURE.]

651 Fleming v. Gillespie, 7 Okla. 430, 54 Pac. 653.

652 Abbott v. Williams, 15 Colo. 512, 25 Pac. 450.

§ 2796. Affidavit for attachment against non-resident.

Form No. 731.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says, as follows:

I. I am the plaintiff in the above-entitled action.

II. The defendant in the said action is indebted to the said plaintiff in the sum of . . . dollars, over and above all legal set-offs and counterclaims, and the said defendant is a non-resident of this state.

III. The sum for which the attachment is asked in the said action, that is to say, the amount of indebtedness which is above stated, is an actual, *bona fide*, existing debt, due and owing from the said defendant to the said plaintiff, and the said attachment is not sought and the said action is not prosecuted to hinder, delay, or defraud any creditor, or creditors of the said defendant.

[JURAT.] [SIGNATURE.]

§ 2797. Affidavit for attachment in tort action.

Form No. 732.

[TITLE.]

[VENUE.]

A. B., being first duly sworn, says: That he is the plaintiff in the above-entitled action; that a cause of action sounding in tort exists in favor of the plaintiff and against the defendant above-named, and that the defendant is not a resident of this state; that said plaintiff's cause of action is one to recover . . . dollars, lawful money of the United States of America, as damages arising from an injury to property in this state belonging to plaintiff, to-wit [state briefly the injury] in consequence of the negligence [fraud, or other wrongful act] of said defendant.

That this attachment is not sought, and said action is not prosecuted to hinder, delay, or defraud any creditor of said defendant.

[JURAT.] A. B.

§ 2798. Amended affidavit of attachment.

Form No. 733.

[TITLE.]

[VENUE.]

A. B., being first duly sworn, says: That he is the plaintiff in the above-entitled action; that he made an affidavit herein on the

. . . day of . . ., 19 . ., for the issuance of a writ of attachment against the property of the defendant C. D., which is on file herein; that at the time of the making of said affidavit said defendant was, and still is, indebted to the plaintiff in a sum exceeding fifty dollars, to-wit, the sum of . . . dollars, and interest thereon from the . . . day of . . ., 19. . , over and above all legal set-offs; and that the same then was, and still is, due upon express [or, implied] contract; that deponent had, at the time of making said affidavit, and still has, good reason to believe that the defendant [state ground or grounds of attachment]; that the deponent makes this affidavit in amendment of and as a substitute for said former affidavit filed herein, and to stand in lieu thereof.

[JURAT.] A. B.

§ 2799. Undertaking on attachment.

Form No. 734.

[TITLE.]

I. Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the state of . . ., in and for the county of . . ., against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to the said plaintiff from the said defendant the sum of . . . dollars, besides interest, and he is about to apply for an attachment against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein:

II. Now, therefore, we, the undersigned, residents and . . . holders of the county of . . ., in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake, in the sum of . . . dollars, and promise to the effect that if the said defendant recover judgment in said action the said plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the said attachment, not exceeding said sum of . . . dollars; and that if the attachment is discharged on the ground that the plaintiff was not entitled thereto under section 537 of the Code of Civil Procedure the plaintiff will pay all damages which defendant may have sustained by reason of the attachment, not exceeding the said sum of . . . dollars.

[DATE.] [SIGNATURES AND SEALS.]

§ 2800. Writ of attachment.

Form No. 735.

[TITLE.]

The People of the State of California, to the Sheriff of the County of . . ., greeting:

I. Whereas, the above-entitled action was commenced in the superior court of the state of . . ., in and for the county of . . ., by the plaintiff in the said action, to recover from the defendant in the said action the sum of . . . dollars, besides interest at the rate of . . . per cent per month, from the . . . day of . . ., 19.., and costs of suit; and the necessary affidavit and undertaking herein having been filed as required by law:

II. Now, we do, therefore, command you, the said sheriff, that you attach and safely keep all the property of the said defendant . . . within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand, as above mentioned; unless the said defendant give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy sueh demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking, and hereof make due and legal service and return.

Witness, Hon. . . ., judge of the said superior court, this . . . day of . . ., 19..

. . ., Judge.

Attest my hand and the seal of said court, the day and year last above written.

C. D., Clerk.
By E. F., Deputy Clerk.

§ 2801. Indorsement on copy of writ of attachment.

Form No. 736.

Sheriff's Office,
City and County of San Francisco,
August . . ., 19..

To A. B.:

Please take notice, that all moneys, goods, credits, effects, debts due or owing, or any other personal property, or all stocks or shares, or interest in stocks or shares, of the . . . company, in your possession or under your control, belonging to the within-

named defendants, or either of them, are attached by virtue of a writ, of which the within is a copy, and you are notified not to pay over or transfer the same to any one but myself.

Please furnish a statement.

C. D., Sheriff.
By E. F., Deputy Sheriff.

§ 2802. Return—Attachment of personal property.

Form No. 737.

Sheriff's Office,
Of the City and County of San Francisco.

By virtue of the annexed writ, I duly attached all moneys, goods, credits, effects, debts due or owing, and all other personal property [or, all stocks or shares, or interest in stocks or shares, of the . . . company], belonging to the defendants therein named [or to either of them], in the possession or under the control of the parties hereinafter named, by serving upon each of them respectively, personally, in the . . . county of . . ., at the times set opposite their respective names, a copy of said writ, with a notice in writing that such property was attached in pursuance of said writ, and not to pay over or transfer the said property to any one but myself. Statement demanded. [Annex names of parties served, time of service, and answers of parties served.]

S. T., Sheriff.
[DATE.] By D. S., Deputy Sheriff.

§ 2803. Sheriff's return and certificate on attachment.

Form No. 738.

[VENUE.]

I hereby certify and return, that by virtue of the within writ of attachment I have on this . . . day of . . ., 19.., at the city of . . ., in said county, levied on all of the right, title, and interest of the within named defendant, C. D., in and to the following-described real [or, personal] property, to-wit: [Here insert accurate description of the real estate, or give an inventory of the personal property attached.]

Witness my hand this . . . day of . . ., 19..

E. F., Sheriff of . . . County, . . .
By G. H., Deputy.

[VENUE.]

I hereby certify, that I have compared the within copy of the writ of attachment in the within-entitled action, and of my return and inventory of attached property thereon as above, with the original writ, return, and inventory in my possession, and that the same are true and correct copies thereof and of the whole thereof.

Witness my hand this . . . day of . . ., 19..

E. F., Sheriff of . . . County, . . .

§ 2804. Notice of motion to discharge attachment.

Form No. 739.

[TITLE.]

To . . . , Attorney for Plaintiff:

Please take notice, that on an affidavit, of which the within is a copy [or, of which a copy is annexed], and on all the papers filed and served in this action, the undersigned will move the court, at . . ., on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action [if for irregularity, add: upon the grounds, among others—specifying the irregularity], and for such other or further order as may be just.

[DATE.] [SIGNATURE.]

§ 2805. The same—Where the motion is simply on giving security.

Form No. 740.

[TITLE.]

To . . . , Attorney for Plaintiff:

Please take notice, that the undersigned will move this court, at . . ., on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action, on giving due security.

[DATE.] [SIGNATURE.]

§ 2806. Affidavit of third person claiming title to attached property.

Form No. 741.

[VENUE.]

E. F., being duly sworn, says:

That pursuant to the writ of attachment issued in the above-entitled action the sheriff of . . . county, on the . . . day of

. . ., 19.., seized and attached certain personal property at the city of . . ., in said county, described as follows: [insert description of personal property], as the property of the above-named defendant, C. D.

Affiant further says, that the said property so seized was not at the time of such seizure the property of said C. D., but was at that time, and still is, the property of this affiant, and that the ground of affiant's title to said property is as follows: [Here state the grounds of affiant's title in full; as, for instance: that the said defendant, C. D., on the . . . day of . . ., 19.., and before the levy of said attachment, for value, sold and delivered the said property to this affiant.]

Affiant further says, that the value of the said property is . . . dollars, and that he makes this affidavit for the purpose of obtaining possession of said property from the said sheriff.

[JURAT.] E. F.

To E. F., Esq., Sheriff of . . . County:

Take notice, that I claim the property described in the foregoing affidavit, and demand delivery thereof.

Dated, . . ., 19.. E. F.

§ 2807. Notice of ownership of attached property by third person.

Form No. 742.

[TITLE.]

To L. M., Sheriff of . . . County, . . . :

You are hereby notified, that the black horse [or otherwise describe the property fully] which you did on the . . . day of . . ., 19.., levy on as the property of C. D., by virtue of a writ of attachment issued out of the district court of . . . county, in the case of A. B., plaintiff, v. C. D., defendant, belongs to me [or, if the affidavit is made by an agent or attorney, say: belongs to E. F.]; that my [or, his] interest therein is that of absolute owner [or state nature of interest]; and that I [or, he] acquired such interest by purchasing the said horse on the . . . day of . . ., 19.., from Y. Z., and I [or, he] paid therefor . . . dollars [or state facts showing how and from whom he acquired his interest in the property and the consideration paid]; and I demand of you the immediate release and surrender of the said horse.

Dated . . ., 19.. E. F.,

[Or, E. F., by G. H., his agent, or attorney.]

[VENUE.]

E. F., being duly sworn, says: That he is the person who signed the foregoing notice and claim; that he has read [or, heard read] said notice; and that the facts therein stated are true.

[If this affidavit is made by an agent or attorney, it should commence:] G. H., being duly sworn, says: That he is the agent [or, attorney] for E. F., and is the person who signed, etc.

E. F.,

[JURAT.] [or, G. H.]

§ 2808. Undertaking on release of attachment.

Form No. 743.

[TITLE.]

Whereas, the above-named plaintiff commenced an action in the superior court of the state of . . ., in and for the county of . . ., against the above-named defendant, claiming that there was due to said plaintiff from said defendant the sum of . . . dollars, besides interest, and thereupon an attachment issued against the property of the said defendant, as security for the satisfaction of any judgment that might be recovered therein, and certain property and effects of the said defendant have been attached and seized by the sheriff of the county of . . ., under and by virtue of the said writ;

And whereas, the said defendant has appeared in the said action, and has applied to the said court, upon reasonable notice to the said plaintiff, for an order to discharge the same upon the execution of an undertaking on behalf of the said defendant, by at least two sureties, residents and freeholders [or, householders] in the said state of . . ., in accordance with the provisions of sections 554 and 555 of the Code of Civil Procedure, and the said court having fixed the sum for which the undertaking shall be executed at the sum of . . . dollars:

Now, therefore, we, the undersigned, residents and householders [or, freeholders] in the said county of . . ., state of . . ., in consideration of the premises, and in consideration of the release from attachment of the property attached, as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake, in the said sum of . . . dollars, and promise that in case the said plaintiff recover judgment in the said action, the said defendant will, on demand, redeliver such attached property

so released to the proper officer, to be applied to the payment of the judgment; and that in default thereof the said defendant and sureties will on demand pay to the said plaintiff the full value of the property released, not exceeding the amount of the said judgment.

[DATE.] [SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 2809. Undertaking to obtain release of partnership property when the interest of one partner only is seized.

Form No. 744.

[TITLE.]

Whereas, the plaintiff above named has sued out a writ of attachment against the defendant, C. D., in this action, by virtue of which the sheriff of . . . county has levied upon certain personal property described as follows: [here insert description of property];

And whereas, it appears, by the affidavit of one E. F., [or, if other affidavits have been filed upon the hearing, recite them] that the property so levied upon is the property of the firm composed of the said C. D. and E. F., and that the interest of one of the partners, to-wit, C. D., only has been levied upon;

And whereas, the said E. F. has made application to the court for an order to discharge the said attachment as to said personal property:

Now, therefore, we, E. F., as principal, and G. H. and J. K., as sureties, hereby undertake, promise, and agree to and with the said sheriff, in the sum of . . . dollars [the amount of the undertaking is to be fixed by the court or judge], that they will pay to the said sheriff on demand the amount of the judgment rendered against said . . ., principal above-named, but not exceeding the amount of the interest of the said C. D. in the said partnership property, if judgment shall be rendered in the above-entitled action in favor of the plaintiff and against the said defendant, the amount of such interest to be determined by reference or otherwise, as the court may direct.

E. F.
G. H.
J. K.

[Add justification of sureties.]

§ 2810. Order vacating writ of attachment.

Form No. 745.

[TITLE.]

On the annexed notice of motion [and the affidavits of L. M. and N. O.], and on motion of G. H. for defendant:

It is ordered, that the attachment issued [or, granted] against the property of the above-named C. D., on the . . . day of. . ., 19.., be discharged; and that any and all proceeds of sales and moneys by said sheriff collected, and all the property attached remaining in his hands, be delivered and paid by him to the defendant or his agent, and released from the attachment.

[DATE.] [SIGNATURE.]

§ 2811. Order continuing attachment or injunction.

Form No. 746.

[TITLE.]

A writ of attachment against the property of the defendant herein [or, an injunction order enjoining and restraining the defendant from; here state act enjoined, during the pendency of this action] having been issued on the . . . day of . . ., 19.., in this action, and the same having been vacated [or, modified] by an order of the court [or, Hon. J. K., the presiding judge of said court], made on the . . . day of . . ., 19.., and the plaintiff having given immediate notice of appeal from such order, and caused to be executed on his part and filed a sufficient undertaking, pursuant to section . . . of the [name statutes], upon such appeal:

On motion of G. H., plaintiff's attorney,—

It is ordered, that the said attachment [or, injunction order] be continued, until the decision of the appeal, unless the defendant shall at any time pending the appeal give an undertaking, with sufficient surety, in the sum of . . . dollars, to abide and perform any final judgment that shall be rendered in favor of such appellant in this action.

[DATE.] J. K., Judge.

§ 2812. Notice of motion to extend attachment lien.

Form No. 747.

[VENUE.]

Please take notice, that on the . . . day of . . ., 19.., [the same not being more than sixty nor less than five days prior to the date of the expiration of the lien of attachment issued and levied

out of said court and cause], at the hour of . . . o'clock in the . . . noon of said day, or as soon thereafter as counsel can be heard, in the courtroom of said above-named court, the undersigned will move the said court to extend the time of said attachment lien for the period of two years from the date on which the said original lien will expire.

To . . . Defendant, and . . . his attorney.

[Signed:] . . ., Attorney for Plaintiff.

§ 2813. Order extending attachment lien.

Form No. 748.

[VENUE.]

Upon motion of . . ., Esq., attorney for plaintiff, [made not more than sixty days nor less than five days prior to the date of expiration of the lien of attachment issued and levied out of said court and cause], and good cause appearing therefor, upon due and legal notice having been given:

It is hereby ordered, that the lien of said attachment be extended for a period of [two years] from the date of the expiration of the original lien of said attachment, to-wit, from the . . . day of . . ., 19.., continuing on to the . . . day of . . ., 19...

Dated this . . . day of . . ., 19..

. . . , Judge of said court.

§ 2814. Release of real property from attachment.

Form No. 749.

John Doe
v.
Richard Roe.

This is to certify, that the certain attachment, issued out of the . . . court of the [. . . township—if a justice's court], county of . . . , state of . . . , on the . . . day of . . . , 19 .., in the action in which John Doe is plaintiff and Richard Roe is defendant, and levied on the . . . day of . . ., 19.., notice of which levy was on the . . . day of . . . , 19.., recorded in book . . . , of attachment records, at page . . . et seq., together with the debt thereby secured, is paid, fully satisfied, and discharged.

Witness my hand and seal, this . . . day of . . ., 19..

[Signed by plaintiff, by his attorney, or by the attaching officer.]

[Acknowledged same as a deed.]

§ 2815. Bond of indemnity, given to sheriff by plaintiff.

Form No. 750.

[TITLE.]

Know all men by these presents, that we, A. B., as principal, and C. D. and E. F., as sureties, are held and firmly bound unto G. H., sheriff of the . . . county of . . ., state of . . ., in the sum of . . . dollars, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the . . . day of . . ., 19..

Whereas, under and by virtue of a writ of attachment, issued out of the superior court of the state of . . ., in and for the . . . county of . . ., in an action wherein the said J. K. was plaintiff and A. B. was defendant, against said defendant, directed and delivered to said G. H., sheriff of the . . . county of . . ., the said sheriff was commanded to attach and safely keep all the property of said defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand; amounting to . . . dollars, as therein stated, and the said sheriff did thereupon attach the following-described goods and chattels [describe chattels];

And whereas, upon the taking of said goods and chattels by virtue of the said writ, L. M. claimed the said goods and chattels as his property;

And whereas, the said plaintiff claims that said property is of the value of . . . dollars and requires of said sheriff that he shall retain said property under such attachment and in his custody:

Now, therefore, the condition of this obligation is such, that if the said A. B., P. Q. and R. S., their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, and administrators, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, or administrators, shall sustain or in any wise be put to, for or by reason of the attachment, seizing, levying, taking, or retention by the said sheriff, in his custody, under said attachment, of the said property claimed as aforesaid, then the above obligation to be void; otherwise, to remain in full force and virtue.

[ATTEST, DATE, ETC.] [SIGNATURES AND SEALS.]

[Justification, if required by sheriff.]

§ 2816. Affidavit to examine garnishee.*

Form No. 751.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff above named; that this action was commenced in this court by the filing of the complaint, affidavit, and undertaking on attachment, and the issuance of the summons and writ of attachment thereon, and that said attachment is still in force.

II. Deponent further says, that he gave information in writing to the sheriff of said . . . county, that one C. D. had in his possession or under his control certain credits [or other personal property] belonging to the defendant, and said sheriff on the . . . day of . . ., 19.., served upon said C. D. a copy of said writ, and a notice that said credits [or other personal property] were attached in pursuance of said writ; that said C. D. thereupon replied [state reply].

III. But this deponent is informed and believes, notwithstanding said reply, that the said C. D. has in his possession or under his control credits [or other personal property] belonging to the defendant as aforesaid, and prays that the said C. D. may be required to attend before this court, and be examined on oath respecting the same.

§ 2817. Order to examine garnishee.

Form No. 752.

[TITLE.]

The People of the State of California, to . . ., greeting:

Whereas, an attachment has been issued out of this court, against the property of the defendants in the above-entitled action, and is still in force;

And whereas, it has been alleged and made to appear that you have in your possession or under your control certain debts, moneys, effects, credits, and other property owing to or belonging to said defendant:

You are therefore commanded, to be and appear before me at . . ., on the . . . day of . . ., 19.., at . . . o'clock . . ., then and there to be examined on oath concerning the same; and you

* (Note: See, also, forms in chapter LXXIV, Supplemental Proceedings.)

are further commanded not to pay, transfer, return, or otherwise part with or dispose of any such debts, moneys, effects, credits, or other property, until duly released according to law.

Given under my hand this . . . day of . . ., 19..

[SIGNATURE.]

§ 2818. Complaint by attaching creditor in aid of writ of attachment against fraudulent grantee, to set aside deed of real estate.

Form No. 753.

[TITLE.]

I. That the said plaintiff has a valid claim against one L. M., in the sum of . . . dollars, and that an action is now pending in the . . . court for . . . county, in said state, in which the plaintiff herein is the plaintiff, and the said L. M. is the defendant, for the recovery of the said claim, and that the summons in said action has been served on the said L. M., and that the complaint therein is now on file in this court.

II. That a writ of attachment was duly issued out of this court on the . . . day of . . ., 19.., in said action in favor of this plaintiff, and against said L. M., and that by virtue of said writ the sheriff of said . . . county on the . . . day of . . ., 19.., levied upon certain lands in said county described as follows: [description]; and that this plaintiff has and owns, by virtue of said writ of attachment and levy thereunder, a lien upon said land.

III. That the said L. M. has no other land or property within this state, as the plaintiff is informed and believes, out of which the plaintiff can realize his said claim.

IV. That, as the plaintiff is informed and believes, the said L. M., on the . . . day of . . ., 19.., and after the claim of the plaintiff hereinbefore mentioned had accrued, conveyed by . . . deed to the defendant, C. D., the said land hereinbefore described, which deed was recorded in the office of the register of deeds of . . . county, on the . . . day of . . ., 19..

V. That, as the plaintiff is informed and believes, the said conveyance was executed by the said L. M. without consideration, and with intent to hinder, delay, and defraud the creditors of the said L. M., including this plaintiff, and that the said defendant, C. D., accepted and received said deed with knowledge of the said fraudulent intent on the part of the said L. M., and with intent

upon his part to assist the said L. M. in his said fraudulent purpose, and to hold the said lands as a secret trust for the said L. M.

VI. That there is now actually and equitably due the plaintiff upon his said demand the sum of . . . dollars, with interest from . . ., 19..

Wherefore, the plaintiff demands judgment that the said deed may be set aside and adjudged fraudulent and void, and that the land therein described be adjudged subject to the lien of the plaintiff's writ of attachment aforesaid; and that the plaintiff have such other and further relief in the premises as shall be just and equitable, with costs.

CHAPTER LXXXVIII.

INJUNCTION.

§ 2819. Defined.—A writ of injunction is defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.[1] The later tendency of the courts is to enlarge the scope of the writ of injunction whenever it is necessary to protect an owner in the beneficial use and enjoyment of his property.[2] "Injunction" and "restraining order" are substantially synonymous.[3] Section 525 of the California Code of Civil Procedure defines an injunction to be a writ or order requiring a person to refrain from a particular act. This definition, however, is intended to apply only to preliminary or interlocutory injunctions, and does not limit the power of the court to decree or order, as the final relief, or part of it, that the party shall do a particular thing, as that he execute a deed, or the like. In New York, mandatory injunctions are not granted under the provisional remedies of the code.[4] But they are proper as part of the final relief.[5]

The primary classification of injunctions may, therefore, be into mandatory and prohibitory. A prohibitory injunction is purely a preventive remedy; if the injury be already done, the writ cannot correct the injury so inflicted. It is not a punishment for past wrongs, but a restraint against the commission of future injuries. This writ is intended to require all parties to leave things just as they were at the time of the issuance of it. It will stay waste, yet it will not change the possession of the property; it will protect a party against future injury, yet it will not settle the question of title or the rights of the parties.[6]

With reference to duration, injunctions are divided into preliminary or interlocutory, and perpetual. The first are such as are issued upon filing the bill or complaint, or at any time

1 High on Injunctions, 2; Wangelin v. Goe, 50 Ill. 459.

2 Sankey v. St. Mary's Academy, 8 Mont. 265, 21 Pac. 23; Lee v. Watson, 15 Mont. 234, 38 Pac. 1077.

3 State v. Lichtenberg, 4 Wash. 407, 30 Pac. 716.

4 Ward v. Kelsey, 14 Abb. Pr. 107.

5 People v. Vanderbilt, 25 How. Pr. 139; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405.

6 Estee's Pl. & Pr., § 4224.

before the final hearing, and which are to continue until the answer is filed, or until the further order of the court, or until the final hearing. A perpetual injunction is granted only at or after a final hearing upon the merits, and may be the sole object of the suit, or be incidental to or in aid of other relief granted by the decree.[7]

§ 2820. **Preliminary, or interlocutory, injunction.**—The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered.[8] It cannot be used to undo what has already been done, nor to take property out of the possession of one party and put it in the possession of the other.[9] It will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law, unless to avoid injurious consequences which cannot be repaired under any standard of compensation.[10] Where the parties are at issue upon a question of legal right, and it is necessary to preserve their respective rights in *statu quo* until the issue is decided, an interlocutory injunction may be properly allowed.[11] Injunction orders are the same in substance everywhere, depending only upon the facts alleged in the complaint or affidavit.[12]

§ 2821. **Temporary injunction—Continued.**—*Ex parte* orders restraining defendant from doing a particular act is an injunction, as defined by section 525 of the Code of Civil Procedure, and subject to dissolution where no undertaking is filed.[13] It is error to grant a temporary injunction without the proper bond.[14] The

7 Estee's Pl. & Pr., § 4225.

8 High on Injunctions, § 4.

9 Farmers etc. v. Reno, 53 Pa. St. 224.

10 Mammoth Vein Coal Co.'s Appeal, 54 Pa. 183.

11 Harman v. Jones, 1 Cr. & Ph. 299; Helm v. Gilroy, 20 Or. 517, 26 Pac. 851; Walts v. Foster, 12 Or. 247, 7 Pac. 24.

12 Cal. Code Civ. Proc., §§ 525, 526; Alaska Codes, pt. 4, ch. 41, §§ 383-388; Ariz. Civ. Code, pars. 2742-2745; Idaho Rev. Codes, §§ 4287, 4288; Mont. Rev. Codes, §§ 6642-6655; Nev. Comp. Laws, §§ 3206, 3207, 3211, 3212; N. Mex. Comp. Laws, §§ 873-875; Or. B. & C. Codes, § 418; Utah Rev. Stats., § 3058; Wash. Bal. Codes, §§ 5413-5452; Wyo. Rev. Stats., § 4044; Colo. Mills' Stats., §§ 375, 1057, 3159.

13 Neumann v. Moretti, 146 Cal. 31, 79 Pac. 512.

14 Price v. Grice, 10 Idaho, 443, 79 Pac. 387.

granting of an injunction *pendente lite* is within the discretion of the trial court.[15] A motion to dissolve an injunction before answer, when made by the employee of the real defendant, and his damage is the mere stopping of his work, will be denied.[16] A temporary restraining order against a corporation is proper to keep it from selling the stock of an insane stockholder until it may be determined by the court whether such sale is a fraud or not.[17] All orders on a hearing for a temporary injunction, or on motion to dissolve, are temporary, and may be modified in the final judgment.[18] The requirement and giving of a bond by a party applying for a restraining order does not change the same to a temporary injunction.[19]

§ 2822. **Mandatory injunction.**—Where a successful claimant is permitted to make his homestead entry, a mandatory injunction will issue to enforce the rights of such entryman, as against the unsuccessful claimant,[20] or to compel a railroad company to construct the statutory cattle-guards.[21] Where a county clerk is about to print an unauthorized ticket on an official ballot, the proper remedy to restrain such officer from exceeding his authority is by injunction and not *mandamus*, since a ministerial officer could not be restrained from such excess by *mandamus*.[22] Plaintiff's right must be clear and certain to warrant mandatory injunction before final hearing.[23]

§ 2823. **Constitutionality of mandatory injunction.**—A code provision providing that an injunction may be granted to restrain the malicious erection on land of any structure intended to spite or annoy the adjoining proprietor, and that where the structure has been completed a mandatory injunction will lie to compel its abatement and removal, is not unconstitutional, because it enjoins an act not prohibited by law.[24] Equity may compel the

15 Heinze v. Boston & M. Cons. etc. Min. Co., 30 Mont. 484, 77 Pac. 421.

16 Smith v. Alberta & B. C. Exploitation etc. Co., 9 Idaho, 399, 74 Pac. 1071.

17 Weber v. Della Mountain Min. Co., 11 Idaho, 264, 81 Pac. 931.

18 Brown v. Donnelly, 19 Okla. 296, 91 Pac. 859.

19 Ex parte Grimes, 20 Okla. 446, 94 Pac. 668.

20 Barnett v. Ruyle, 9 Okla. 635, 60 Pac. 243; Glover v. Swartz, 8 Okla. 642, 58 Pac. 943.

21 Atchison etc. Ry. v. Billings, 77 Kan. 119, 93 Pac. 590.

22 State v. Moran, 24 Mont. 433, 63 Pac. 390.

23 Lanham v. Wenatchee Canal Co., 48 Wash. 337, 93 Pac. 522.

24 Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

undoing of illegal acts already done, as well as to restrain the doing of such acts.[25]

§ 2824. Mandatory injunction—Continued.—Mandatory injunction will not lie in replevin for property belonging to an officer in a corporation when the thing in dispute is the title to the office.[26] But such an injunction is properly allowed pending a suit requiring the removal of logs from plaintiff's land.[27] An application for a mandatory injunction to prohibit certain nonjudicial acts by the state land commissioners is not within the original jurisdiction of the supreme court.[28] Where defendant wrongfully constructs a ditch one hundred and ten to one hundred and twenty feet wide across plaintiff's land, plaintiff is entitled to an injunction compelling defendant to fill the ditch up.[29]

§ 2825. Form of injunction negative.—It is often said, in a general way, that the form of an injunction must always be in the negative; but if that be true, there can be no such thing as mandatory injunctions, or injunctions requiring the performance of an act. Such expressions are generally used in cases in which the court is asked for an injunction, requiring the defendant to do an act which cannot properly be required by a court of equity, because the plaintiff has a remedy at law by the recovery of damages, if the defendant omit to do the act. In an English case,[30] where an injunction was asked, prohibiting certain acts, and also that defendant make certain repairs, Eldon, lord chancellor, expressed a difficulty, "whether it is according to the practice of the court to decree or order repairs to be done." In this case, however, the difficulty was overcome by requiring the defendant to refrain from such things as were clearly within the power of the court to order, but which, in this particular case, involved the repairs as a matter of necessity, so that the prohibitory order could not well be observed without making the repairs. So, in a patent case,[31] the circuit court says: "As a remedy, it should be used only for prevention or protection."

25 Farnsworth v. Town of Wilbur, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.), 320.

26 Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

27 White v. Codd, 39 Wash. 14, 80 Pac. 836.

28 State v. Ross, 39 Wash. 399, 81 Pac. 865.

29 McRae v. Blakeley, 3 Cal. App. 171, 84 Pac. 679; Chittenden v. Blakely (Cal. App.), 84 Pac. 681.

30 Lane v. Newdigate, 10 Ves. 194.

31 Sanders v. Logan, 2 Fisher's Pat. Cas. 170, Fed. Cas. No. 12295.

But in this case the bill prayed for an injunction and an account; and the court held that the accounting would be improper, as the true measure of damages for the use or infringement of a patent was the value of a license, and that might be recovered at law, and that the remedy by injunction is neither necessary nor proper to enforce the payment of money.

The general rule doubtless is that preliminary or interlocutory injunctions are prohibitory or preventive merely, and must therefore be negative in form. And it is also the general rule that such an injunction should not attempt to do indirectly that which it cannot do directly.[32]

§ 2826. Jurisdiction as to courts.—Independently of the statute, injunctions could only be granted by courts of equity, or by a chancellor, or by a master in chancery. By statute in the different states the power is granted to certain courts of inferior jurisdiction, court commissioners, and the like, to grant or issue temporary injunctions; but in all such cases the power is conferred and exercised as auxiliary to a court of general jurisdiction having equity powers. The effect of such an order made by a county judge is the same as if made by the district court, and the injunction is subject to be controlled, modified, or dissolved by the district judge, the same as if issued by his order in the first instance.[33] In New York, a county judge has no power to grant an injunction in an action not triable within his county; and if he does, it is void, instead of voidable.[34] In California, a writ or order of injunction may be granted by the court in which the action is brought, or by a judge thereof, and, when made by a judge, it may be enforced as an order of the court;[35] but court commissioners have no power to grant writs or orders of injunction.[36]

Original jurisdiction over temporary injunctions conferred on the supreme court by the Revised Statutes of 1887, and continued in 1899, is repealed by the Wyoming constitution.[37] A district judge, at chambers, has power to dissolve a restraining order

32 Akrill v. Selden, 1 Barb. 317; Blackmore v. Glamorgan Canal, 1 Myl. & K. 183.

33 Borland v. Thornton, 12 Cal. 440.

34 Eddy v. Howlett, 2 Code Rep. 76; Chubbuck v. Morrison, 6 How. Pr. 367.

35 Cal. Code Civ. Proc., § 525.

36 Cal. Code Civ. Proc., § 259, subd. 1.

37 Const., art. 5, §§ 2, 3. See Smith v. Healy, 12 Wyo. 218, 75 Pac. 430.

granted by a probate court, as well as a temporary injunction.[38] To warrant the supreme court of Colorado in taking jurisdiction in an original proceeding by injunction, the case made by the complaint must not only show equitable ground for relief, but must disclose a question involving the rights or franchises of the state in its sovereign capacity—that is, public rights or interests, as contradistinguished from matters of private or individual concern.[39] In California, the superior court cannot enjoin the execution of a mandate of the supreme court. The order of the supreme court must control, and any conflicting order from the superior court must be disregarded.[40]

§ 2827. Jurisdiction as to subject-matter.—A court of equity is without jurisdiction to enjoin a person not a party to the suit from using water, the right to which is determined in that action.[41] An injunction to prevent the closing up of an underground crossing of a railroad operates *in personam*, and is not one which must be brought in the county in which the subject of the action is situated.[42] A court of equity has no jurisdiction to restrain a board of supervisors from proceeding on an application for the formation of a reclamation district.[43] Plaintiff cannot sue for an injunction on the same grounds as the one on which an injunction has just been denied.[44]

§ 2828. When injunction lies.—Injunction and writs of prohibition may be issued and served on legal holidays and non-judicial days.[45] The granting or dissolving an injunction rests in the sound discretion of the court and on the justice and equity of each particular case.[46] The plaintiff's right, in order to be protected by injunction, must be such as can be enforced in the

38 Hurd v. Atchison etc. Ry. Co., 73 Kan. 83, 84 Pac. 553.

39 People v. McClees, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646. To same effect, see Attorney-General v. Chicago etc. R. R. Co., 35 Wis. 425; State v. Cunningham, 83 Wis. 90, 35 Am. St. Rep. 27, 53 N. W. 35, 17 L. R. A. 145.

40 Quan Wo Chung v. Laumeister, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac. 320.

41 State v. District Court, 34 Mont. 233, 85 Pac. 525.

42 Chicago etc. Ry. Co. v. Wynkoop, 73 Kan. 590, 85 Pac. 595.

43 Glide v. Superior Court, 147 Cal. 21, 81 Pac. 225.

44 Maloney v. King, 30 Mont. 414, 76 Pac. 939.

45 Cal. Code Civ. Proc., §§ 76 (subd. 5), 134.

46 Blue Bird Min. Co. v. Murray, 9 Mont. 468, 23 Pac. 1022; Hudson River Tel. Co. v. Watervliet etc. R. R. Co., 121 N. Y. 397, 24 N. E. 832.

court to which he applies;[47] and an injunction will not be granted where the acts complained of have already been done.[48] However, where defendant wrongfully constructs a ditch on plaintiff's land, he may be compelled to refill it.[49]

The California statute gives seven instances where the writ of injunction may issue, to-wit: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or the continuance of the act complained of, either for a limited period or perpetually; 2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to a party to the action.[50] So in aid of an action of trespass, where it appears that the injury will be irreparable and cannot be compensated in damages;[51] and an action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the land, which could not be specifically replaced.[52] 3. When it appears, during the litigation, that a party to the action is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual;[53] 4. When pecuniary compensation would not afford adequate relief; 5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; 6. When the restraint is necessary to prevent a multiplicity of judicial proceedings; 7. Where the obligation arises from a trust. The last four cases were added by the amendments of 1907, and the privilege of injunction extended to any party in the action. By the same amendment, seven instances were named in which injunction cannot be granted.[54] But a careful reference to the decisions of our courts in cases arising under each of those sub-

47 Rogers v. Mich. So. R. R., 28 Barb. 541. See, also, Reubens v. Joel, 13 N. Y. 492; overruling Mott v. Dunn, 10 How. Pr. 225.

48 Perkins v. Warren, 6 How. Pr. 347.

49 McRae v. Blakeley, 3 Cal. App. 171, 84 Pac. 679; Chittenden v. Blakely (Cal. App.), 84 Pac. 681.

50 Cal. Code Civ. Proc., § 526.

51 Waldron v. Marsh, 5 Cal. 119. But see Erpstein v. Berg, 13 How. Pr. 92.

52 More v. Massini, 32 Cal. 590, and authorities therein cited. See, also, Smith v. Gardner, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771.

53 Cal. Code Civ. Proc., § 526, subd. 3; N. Y. Code Civ. Proc., § 604.

54 Cal. Code Civ. Proc., § 526, as amended 1907; Stats. 1907, p. 341.

divisions will be necessary to understand fully their meaning. The decisions of the highest court of California, as well as those of many other states in the Union, have been exhaustive upon the points arising under this and similar statutes.[55] When a complaint alleges irreparable injury to growing crops, and that the damage cannot be justly estimated, plaintiff is entitled to an injunction.[56] Injunction is the proper remedy for wrongful use of premises in excess of an easement granted.[57]

Injury to real property must be continuing to authorize an injunction.[58] And if the trespass be fugitive and temporary, and capable of adequate compensation, an injunction will not be granted.[59] An injunction ought not to be granted, unless equitable circumstances beyond the mere allegation of irreparable injury be shown; as insolvency, impediments to a judgment at law, or to adequate, legal relief, or a threatened destruction of the property, or the like.[60]

§ 2829. Injunction, when granted.—Injunction to restrain injuries in the nature of waste should not be issued before the hearing of the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continu-

55 See Cal. Civ. Code, § 3422.

56 Wilson v. Eagleson, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613.

57 Winslow v. City of Vallejo, 148 Cal. 723, 113 Am. St. Rep. 349, 84 Pac. 191, 5 L. R. A. (N. S.) 851.

58 Coker v. Simpson, 7 Cal. 340; Tuolumne Water Co. v. Chapman, 8 Cal. 392; Mooney v. Cooledge, 30 Ark. 640; Shimer v. Morris Canal etc. Co., 27 N. J. Eq. 364.

59 Minnig's Appeal, 82 Pa. St. 373; Fort Clark etc. Ry. Co. v. Anderson, 108 Ill. 64, 48 Am. Rep. 545.

60 Burnett v. Whitesides, 13 Cal. 156. As to injunctions for waste generally, see Stauffer v. Eaton, 13 Ohio, 322; Barcalow v. Sanderson, 17 N. J. Eq. 467; Cooper v. Davis, 15 Conn. 556; Brady v. Waldron, 2 Johns. Ch. 148; Salmon v. Clagett, 3 Bland Ch. (Md.) 125; Brumley v. Fanning, 1 Johns. Ch. 501; White Water etc. Co. v. Comegys, 2 Ind. 469; Fox v. Fitzsimmons, 29 Hun, 574; Wheelock v. Noonan, 108 N. Y. 179, 2 Am. St. Rep. 405, 15 N. E. 67; Tantlinger v. Sullivan, 80 Iowa, 218; Loudon v. Warfield, 5 J. J. Marsh. 196; Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621; Lewis v. North Kingstown, 16 R. I. 15, 27 Am. St. Rep. 724, 11 Atl. 173; McCollough v. Irvine's Exrs., 13 Pa. St. 438; 6 Eng. L. & Eq. 404; Thorn v. Sweeney, 12 Nev. 251. Whether a provisional injunction should issue to stay anticipated waste in cases where the title to the premises is disputed, see Morse v. O'Reilly, 6 Penn. Law Jour. 501, Fed. Cas. No. 9858; United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998. That an injunction may be granted in a proper case to restrain waste, see Thruston v. Mustin, 3 Cranch C. C. 335, Fed. Cas. No. 14013. Injunction to restrain nuisance, as to special injury, see Fogg

ance.[61] In cases which are doubtful, to prevent irreparable mischief, a temporary injunction may be granted.[62] In actions for waste in cutting timber it may be questionable whether an injunction is proper as to timber already cut; but the court having acquired jurisdiction, it may require defendant to give security to account as a condition, modifying the injunction in this respect.[63] Digging lead ore from the lead mines upon public lands in the United States is such a waste as entitles the United States to a writ of injunction to restrain it.[64] A court of equity will in some cases enjoin against the removal of the fruits of past waste.[65] If plaintiff owns a ditch and right of way for the same, to conduct water for mining purposes, the court should not, in an action to enjoin another party from washing away the ground over which it passes, allow the defendant to wash away the ditch if he replaces it by a flume or other aqueduct, and gives a bond for damages, but should grant the injunction.[66]

§ 2830. **When injunction cannot be granted.**—By an amendment of the Code of Civil Procedure in the year 1907, the California legislature specified seven instances in which an injunction cannot be granted, as follows, to-wit: 1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings; 2. To stay proceedings in a court of the United States; 3. To stay proceedings in another state upon a judgment of a court of that state; 4. To prevent the execution of a public statute by officers of the law for the public benefit; 5. To prevent the breach of a contract, the performance of which would not be specifically enforced; 6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession; 7. To prevent a legislative act by a municipal

v. Nevada etc. Ry., 20 Nev. 429, 23 Pac. 840; Gardner v. Stroever, 89 Cal. 26, 26 Pac. 618.

[61] Hicks v. Michael, 15 Cal. 116; Jerome v. Ross, 7 Johns. Ch. 315, 11 Am. Dec. 484; Sixth Ave. R. R. Co. v. Kerr, 28 How. Pr. 382; affirming 45 Barb. 138.

[62] Thruston v. Mustin, 3 Cranch C. C. 335, Fed. Cas. No. 14013.

[63] Weatherby v. Wood, 29 How. Pr. 404. Whether a provisional injunction should issue to stay anticipated waste in cases where the title to the premises is disputed, see Morse v. O'Reilly, 6 Penn. Law Jour. 501, Fed. Cas. No. 9858; United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998.

[64] United States v. Gear, 3 How. 120, 11 L. Ed. 523.

[65] United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998.

[66] Gregory v. Nelson, 41 Cal. 278.

corporation.[67] An individual without a special damage cannot enjoin an alleged invasion of a public right, unless so authorized by statute.[68]

§ 2831. When injunction will not be granted.—Injunctions are not granted except with great caution, and in cases where the right and necessity are clear;[69] and should not be granted in a matter merely pecuniary, where the probabilities are against the plaintiff's success upon the trial of the cause.[70] One court cannot, by injunction, restrain the executions or orders of another court of equal and co-ordinate jurisdiction.[71] Some of the New York courts have deviated from this apparently well-settled rule. The superior court cannot enjoin the execution of a mandate of the supreme court, and any conflicting order from the superior court must be disregarded.[72] Nor can a state court enjoin the proceedings of a United States court.[73] Also, a United States court has no jurisdiction to enjoin proceedings in a state court.[74] But this general rule seems to have three exceptions: 1. Where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions;[75] but not where there are only two actions for the same cause.[76] A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits in which all the claimants to the title were parties.[77] 2. Where they lead in their execution to the commission of irreparable injury to the freehold; 3. Where the claim of the adverse party is valid upon the face of the instrument, or the proceeding sought to be set aside, and extrinsic facts

67 Cal. Code Civ. Proc., § 526, as amended 1907; Stats. 1907, p. 341.

68 Vickery v. Wilson, 40 Colo. 490, 90 Pac. 1034.

69 Roberts v. Matthews, 18 Abb. Pr. 199; Longshore Printing Co. v. Howell, 26 Or. 527, 46 Am. St. Rep. 640, 38 Pac. 547, 28 L. R. A. 464.

70 Fredricks v. Mayer, 1 Bosw. 232; Cal Civ. Code, § 3423.

71 Revalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304; Uhlfelder v. Levy, 9 Cal. 614; Judson v. Porter, 51 Cal. 562; Wilson v. Baker, 64 Cal. 475, 2 Pac. 253.

72 Quan Wo Chung v. Laumeister, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac 320.

73 Phelan v. Smith, 8 Cal. 520. See, also, McKim v. Voorhies, 7 Cranch, 281, 3 L. Ed. 342.

74 Diggs v. Wolcott, 4 Cranch, 180, 2 L. Ed. 587.

75 New York etc. R. R. Co. v. Schuyler, 8 Abb. Pr. 241; Heywood v. City of Buffalo, 14 N. Y. 541.

76 McHenry v. Hazard, 45 Barb. 657.

77 Knowles v. Inches, 12 Cal. 212. See Peterson v. Weissbein, 70 Cal. 423, 12 Pac. 415.

are necessary to be proved, in order to establish the invalidity or illegality. In such cases equity will interpose.[78]

§ 2832. When injunction will not be granted—Other remedies.—Injunction will lie to restrain temporarily an act which will result in great injury to plaintiff, though he may have other remedies.[79] Plaintiff may have relief in equity against a note alleged to have been forged, though such defense may be used in the suit on the note when brought, and plaintiff may also perpetuate his testimony.[80]

Quo warranto, and not injunction, is the only remedy in an action to test the title to an appointment to an office.[81]

§ 2833. When injunction will not be granted—Remedy at law.—Where defendant is solvent, an alleged injury which can be fully compensated in money cannot be remedied by injunction.[82] But the mere insolvency of a trespasser does not warrant an injunction against him.[83] Suit to determine the existence of a highway cannot be had by injunction, because plaintiff has an adequate remedy at law.[84] A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a court of chancery.[85] But it must be made to appear that the legal remedy would be adequate and complete.[86] And a preliminary suit at law is not necessary where the mischief would be irremediable.[87] When its purposes can be as fully accomplished by any other proceeding, an injunction will not be granted.[88]

78 Merril v. Gorham, 6 Cal. 41; Leach v. Day, 27 Cal. 643; Logan v. Hillegass, 16 Cal. 200; DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

79 Price v. Price, 10 Idaho, 443, 79 Pac. 387.

80 Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 107 Am. St. Rep. 791, 79 Pac. 601

81 Hubbell v. Armijo, 13 N. Mex. 482, 85 Pac. 1046.

82 Marshall v. Homier, 13 Okla. 264, 74 Pac. 368; Harlow v. Oregonian, 45 Or. 520, 78 Pac. 737; Thompson v. Tucker, 15 Okla. 486, 83 Pac. 413; Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. (N. S.) 733.

83 Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

84 Tomasini v. Taylor, 42 Or. 576, 72 Pac. 324.

85 Merril v. Gorham, 6 Cal. 41; Leach v. Day, 27 Cal. 643; Logan v. Hillegass, 16 Cal. 200; DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

86 Hager v. Shindler, 29 Cal. 47; Gardner v. Stoever, 81 Cal 148, 22 Pac. 483, 6 L. R. A. 90.

87 Foote v. Linck, 5 McLean, 616, Fed. Cas. No. 4913.

88 Rogers v. Mich. So. R. R., 28 Barb. 541.

In California, the rules and principles of equity practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction.[89] But injunction will not be refused merely because the plaintiff would, on the same showing, be entitled to an order of arrest.[90] Where the question is doubtful, the burden of proof lies upon the party applying for an injunction to show that the argument, *ad inconvenienti*, is in his favor.[91] In all such cases, the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief.[92]

§ 2834. Grounds—Anticipated and trivial injury.—An injunction will not issue to protect a merely nominal interest,[93] nor to prevent a consequential injury resulting from the lawful exercise of a right.[94] There is no ground for merely preventive injunction when the acts complained of have been already performed, and the defendant has not threatened to do any other or further act tending to injure the plaintiff.[95] Injunction lies to restrain the threatened destruction of timber;[96] also, threatened injury to a right of way,[97] though mere apprehension of a threatened wrong is not enough.[98]

By the express provisions of section 3423 of the Civil Code, injunction cannot be granted to prevent the breach of a contract, the performance of which cannot be specifically enforced.[99] The loss sustained by a parent on account of a threatened change in school-books is too small to entitle him to relief by injunction.[100]

Where a bill to restrain the establishment of a pesthouse by a city did not allege that any steps had been taken towards its

89 Minturn v. Hays, 2 Cal. 590, 56 Am. Dec. 366; Sankey v. St. Mary's Academy, 8 Mont. 265, 21 Pac. 23.

90 Merritt v. Thompson, 3 E. D. Smith, 294.

91 Child v. Douglas, 5 De G. M. & G. 739; Bruce v. Delaware etc. Canal Co., 19 Barb. 378.

92 Hicks v. Michael, 15 Cal. 116.

93 Wetmore v. Story, 3 Abb. Pr. 281.

94 Williams v. New York Cent. R. R., 18 Barb. 247, 16 N. Y. 97, 69 Am. Dec. 651.

95 Gardner v. Stroever, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90.

96 Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171.

97 Kittle v. Pfeiffer, 22 Cal. 485.

98 Mariposa Co. v. Garrison, 26 How. Pr. 448; Hurd v. Atchison etc. Ry., 73 Kan. 83, 84 Pac. 553. To restrain boycotting, see Sherry v. Perkins, 147 Mass. 212, 9 Am. St Rep. 689, 17 N. E. 307; Casey v. Cincinnati Typographical Union, 45 Fed. 135, 12 L. R. A. 193.

99 Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166.

100 Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984.

erection and maintenance, or any effectual action taken as to such establishment, an injunction restraining the erection should have been denied.[101] It must appear that the acts of those sued caused the injury, and that if such acts continue damages will follow.[102] A threat to lease certain land for purposes which will contaminate the city water supply is too remote an injury.[103] If the injury is only occasional, and the damage is small and accidental, rather than a probable and necessary consequence, an injunction should be denied.[104] It is an abuse of discretion to grant a temporary injunction in a mining suit, where defendant is working veins within his own ground, and there is a mere chance that their apexes were within plaintiff's ground.[105]

§ 2835. **Grounds—Insolvency of defendant.**—Proof that defendants are insolvent is not of itself sufficient to justify granting an injunction against a trespasser.[106] Equity has jurisdiction of a suit against insolvent defendants to restrain a bank, also made a party, from paying money claimed by plaintiff to such defendants, since a judgment at law would be uncollectible.[107]

§ 2836. **Grounds—To prevent other suits.**—In a suit to enjoin the state board of assessors from proceeding to assess corporate property, it is immaterial to determine as a ground of equitable relief whether the complainants will be compelled to institute a multiplicity of suits.[108] A court of equity, under its jurisdiction to prevent a multiplicity of suits, will take jurisdiction of a suit by one property-owner on behalf of himself and all others similarly interested, though they have no joint interest, to restrain the enforcement of a special assessment, void on its face, though such assessment is not a cloud on their titles.[109] Where the defendants comprised about three thousand parties, with the same kind of

101 City of Kansas City v. Hobbs, 62 Kan. 866, 62 Pac. 324.

102 West Point Irr. Co. v. Moroni etc. Irr. Ditch Co., 21 Utah, 229, 61 Pac. 16.

103 City of Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186.

104 Peterson v. City of Santa Rosa, 119 Cal. 387, 51 Pac 557.

105 Montana Ore-Purchasing Co. v. Boston etc. Co., 22 Mont. 159, 56 Pac. 120.

106 Parker v. Furlong, 37 Or. 248, 62 Pac. 490; Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

107 Wheeler v. Lack, 37 Or. 238, 61 Pac. 849.

108 People v. District Court, 29 Colo. 182, 68 Pac. 242.

109 Dumars v. City of Denver (Colo. App.), 65 Pac. 580.

a suit against a railroad company, for refusing to honor certain tickets, equity may take the case and consolidate the actions, and dispose of it in its entirety.[110]

§ 2837. Grounds—Inadequate remedy at law.—Injunction should not be granted where the law affords an adequate remedy.[111] Where the owner has taken a bond for the performance of a contract, the contractor's breach, by failing to complete the building, and necessitating its completion at an added cost, does not entitle the owner to an injunction restraining the collection of an order previously issued for part of the work, and in the hands of an assignee for value, since the owner has adequate remedy at law.[112] Injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and though plaintiff has other remedies.[113]

§ 2838. Time of granting injunction.—The plaintiff is entitled to an injunction at any time before judgment upon the complaint alone, verified in the manner provided by law, or upon affidavits. A copy of the complaint or of the affidavits upon which the injunction was granted must, if not previously served, be served therewith. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor.[114] Under the former California Practice Act, a plaintiff seeking an injunction after summons issued had to do so upon affidavits, but this is no longer the rule; the writ may issue upon the complaint at any time before judgment.[115] When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint in advance of the filing to the judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our statute.[116] In such cases, the order does not take effect until the filing of the complaint and the undertaking required.[117] No injunction granted prior to the actual trial of the cause wherein it is granted shall continue in force longer than twelve

110 Southern Pacific Co. v. Robinson, 132 Cal. 408, 64 Pac. 572.

111 Winans v. Beidler, 6 Okla. 630, 52 Pac. 405; Irwin v. Exton, 125 Cal. 622, 58 Pac. 257.

112 Long Beach School Dist. v. Lutge, 129 Cal. 409, 62 Pac. 36.

113 Staples v. Rossi, 7 Idaho, 618, 65 Pac. 67.

114 Cal. Code Civ. Proc., § 527.

115 Cal. Code Civ. Proc., § 527; Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

116 Heyman v. Lander, 12 Cal. 107.

117 Id.

months after answer filed, except by consent of the parties, unless the cause has been set for trial upon its merits, or unless the party in whose favor it was granted has tried to have it set for trial.[118] When the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction *pendente lite* should be denied.[119] An application for injunction prematurely made should be denied.[120]

§ 2839. **Complaint.**—On a motion for an injunction, the plaintiff must rest on the case stated in the bill, though he may, by affidavits, state with more particularity any matters which it sets forth, and refer to collateral matters which explain or which tend to support and strengthen it; he may also in the same way contradict any statements made by the defendant in his affidavit, and either party may take and read the affidavits of other persons.[121] No injunction can be granted on the complaint unless it is verified.[122]

Where the facts lie only in the knowledge of the defendant, and discovery is sought, the plaintiff, in a petition for injunction, may state that he is informed and believes that a fact is true, and therefore charges it to be true, such case being an exception to the general rule requiring specific allegations of the facts on which the injunction is asked.[123] If the principal allegations in a verified complaint are stated on information and belief, and the sources thereof are set out in affidavits, an injunction may be granted thereon.[124]

§ 2840. **Averments of complaint—Verification.**—The complaint must clearly show that there is no remedy at law.[125] It is not indispensable that a bill of injunction should contain a prayer for discovery.[126] The simple allegation of "irreparable injury" is not sufficient; it should appear to the court from the facts set forth in the bill.[127] Plaintiff is entitled to an injunction upon the

118 Cal. Code Civ. Proc., § 527.

119 Gagliardo v. Crippen, 22 Cal. 362.

120 Porter v. Speno, 13 Idaho, 600, 92 Pac. 367.

121 Crowder v. Tinker, 19 Ves. 621; Cooper v. Mattheys, 8 Law Rep. 413.

122 Cal. Code Civ. Proc., § 527.

123 Tibbits v. Miller, 9 Okla. 677, 60 Pac. 95.

124 Price v. Grice, 10 Idaho, 443, 79 Pac. 387.

125 Tomlinson v. Rubio, 16 Cal. 202; Leach v. Day, 27 Cal. 643; Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282.

126 Lawrence v. Bowman, 1 McAll. 419, Fed. Cas. No. 8134.

127 DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Branch Turnpike Co.

complaint alone, if it makes a proper case and is verified; but if he asks for an injunction thereafter, he must do so upon affidavit.[128]

§ 2841. Sufficient complaints.—The complaint for an injunction stating a cause for relief, the court should not dismiss the case upon the dissolution of the preliminary injunction.[129] An allegation that defendant, by repeated trespasses, is trying to deprive plaintiff of its location is sufficient to sustain an injunction.[130]

§ 2842. Insufficient complaints.—A mere allegation of irreparable injury is not sufficient in an action for an injunction;[131] nor the fact that defendant railroad has made repeated surveys of land.[132] A petition to restrain defendant from making landings on certain land bordering on a river, averring that such entry causes plaintiff continuous and daily damages which are irreparable, is not sufficient if it does not state facts showing how or why the damage is irreparable.[133] In a complaint to enjoin a boycott, the contents of the circulars alleged to have been distributed should be set out in substance, and the particular threats and force used should be alleged.[134] A petition to enjoin the payment of a certain claim must allege that such bill has been made out and filed, or that it will be presented.[135] A complaint to restrain the destruction of telegraph poles and wires must set forth the threats

v. Board of Supervisors, 13 Cal. 190; Waldron v. Marsh, 5 Cal. 119; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724. Thus, when an injunction is sought to restrain irreparable injury to the inheritance, from a trespass threatened in the nature of waste, the complaint need not allege the insolvency of the defendant, see Crescent City Wharf & Lighter Co. v. Simpson, 77 Cal. 286, 19 Pac. 426. As to requisite allegations in complaint or bill for an injunction, see Otis v. Sweeney, 48 La. Ann. 940, 20 South. 229; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; Howell Co. v. Glucose Co., 61 Ill. App. 593; Brough v. Schanzenbach, 59 Ill. App. 407; Schroetter v. Brown, 59 Ill. App. 24. As to requisites of affidavit in support of application for injunction, see Howard v. Eddy, 56 Kan. 498, 43 Pac. 1133; Uhl v. Irwin, 3 Okla. 388, 41 Pac. 376.

128 Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

129 Spar Cons. Min. Co. v. Casserleigh, 34 Colo. 454, 83 Pac. 1058.

130 Arizona etc. R. R. Co. v. Denver & R. G. Co., 13 N. Mex. 345, 84 Pac. 1018; Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166; Buck v. Fitzgerald, 21 Mont. 482, 54 Pac. 942.

131 Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239.

132 Hurd v. Atchison etc. Ry. Co., 73 Kan. 83, 84 Pac. 553.

133 California Nav. etc. Co. v. Union Transp. Co., 122 Cal. 641, 55 Pac. 591.

134 Davitt v. American Bakers' Union, 124 Cal. 99, 56 Pac. 775.

135 McBride v. Newlin, 129 Cal. 36, 61 Pac. 577.

of defendant and the fears of plaintiff, and that defendants are insolvent; though the latter may not be necessary.[136]

§ 2843. **Parties to the injunction.**—Where parties owning certain lands, contracted jointly with another for the removal of the timber, it is proper for them to join in an action restraining the removal of timber not embraced in the contract.[137] The court gets jurisdiction of parties when they make a motion to dissolve an injunction against them.[138] Representatives of a deceased maker of a note are not necessarily parties to an action by two other purported makers, who attempt to restrain the collection of the same on the ground that their signatures were forged.[139]

§ 2844. **Service of the injunction.**—Where an injunction is granted on the complaint, a copy of the complaint and verification attached must be served with the injunction.[140] If the court or judge deems it proper that the defendant be heard before granting the injunction, an order may be made requiring the defendant to show cause at a particular time and place why the injunction should not be granted, and the defendant may in the mean time be restrained; but if it involves the flow of water in its natural channels, notice of the application must first be served on defendant.[141] An injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice to the officers or managing agent, unless the people of this state are a party.[142] Application to modify or dissolve an injunction granted without notice may be made upon reasonable notice, upon the complaint or affidavits of plaintiff, or upon additional affidavits of the defendant, which latter affidavits may be opposed by new affidavits on the part of the plaintiff.[143]

136 Haupt v. Independent Tel. Messenger Co., 25 Mont. 122, 63 Pac. 1033; Schmid v. Bitzer, 138 Cal. xix, 71 Pac. 563.

137 Elliott v. Bloyd, 40 Or. 326, 67 Pac. 202.

138 State v. Kennan, 35 Wash. 52, 76 Pac. 516.

139 Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 107 Am. St. Rep. 791, 79 Pac. 601.

140 Cal. Code Civ. Proc., § 527. See Eureka etc. Canal Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490; Golden Gate etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628. As to issue of injunction without notice, see Hobbs v. Amador etc. Canal Co., 66 Cal. 161, 4 Pac. 1147; Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489.

141 Cal. Code Civ. Proc., § 530, as amended 1907. As to duration of restraining order, see San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216, 35 Pac. 651.

142 Cal. Code Civ. Proc., § 531, as amended 1907.

143 Cal. Code Civ. Proc., §§ 532, 937.

§ 2845. Undertaking for injunction.—The proper form of an injunction bond is to answer all damages which the defendant may sustain in consequence of the injunction being granted.[144] The statutory condition is that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.[145] This undertaking is required whether the injunction be granted upon an *ex parte* application or upon an order to show cause.[146]

An injunction order is inoperative until the undertaking required by the statute is given.[147] But where the state, or the people of the state, or any state officer in his official capacity, or any county, city, or town, is plaintiff, no undertaking is required.[148] And no undertaking is required where a wife is plaintiff against her husband.[149]

§ 2846. Exception to bond.—The person enjoined may except to the sufficiency of the sureties within five days after service of the injunction. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the sureties must justify before a judge or county clerk, upon notice to the person enjoined of not less than two days, in the same manner as upon bail on arrest, and upon a failure to justify, at the time and place appointed, the order granting an injunction must be dissolved.[150] Section 529 of the California Code of Civil Procedure must be construed to mean that notice of justification must be given to the defendant of not less than two nor more than five days after the filing and service of the notice of exception to the deficiency of the sureties, and the plaintiff's sureties must justify within five days after said notice of exception is given, or the injunction will be dissolved upon notice.[151] A bond in injunction is not insufficient for the reason that the sureties did not qualify

144 Bein v. Heath, 12 How. 168, 13 L. Ed. 939.

145 Cal. Code Civ. Proc., § 529.

146 McCracken v. Harris, 54 Cal. 81.

147 Elliott v. Osborne, 1 Cal. 396.

148 Cal. Code Civ. Proc., § 1058.

149 Cal. Code Civ. Proc., § 529, as amended 1907; Alaska Codes, pt. 4, ch. 41, § 384; Ariz. Civ. Code, par. 2747; Idaho Rev. Codes, § 4291; Mont. Rev. Codes, § 6646; Nev. Comp. Laws, § 3215; Or. B. & C. Codes, § 418; Utah Rev. Stats., § 3060; Wash. Bal. Codes, § 5438; Wyo. Rev. Stats., §§ 4043, 4175.

150 Cal. Code Civ. Proc., § 529, as amended 1907.

151 McSherry v. Pennsylvania etc. Min. Co., 97 Cal. 637, 32 Pac. 711.

that they were householders or freeholders of the county as provided.[152]

§ 2847. **Restraining order.**—A restraining order is intended to continue only until the propriety of granting a temporary injunction can be determined.[153] The vitality of a restraining order, is not necessarily, or even usually, limited by the date mentioned in it.[154] Whether such order is of force without an undertaking being filed has been questioned.[155] The statute does not expressly require an undertaking as a condition for a restraining order, although this court has said one ought to be required.[156] The granting of such an order is entirely within the discretion of the court, and doubtless an undertaking may be required as a condition of its allowance in cases where the order would necessarily cause loss or injury to the defendant if the right to an injunction did not exist. We understand, also, that it is the usual practice not to require an undertaking.[157]

In absence of a showing of a case of emergency, it is error to allow a restraining order in a divorce action to keep defendant from interfering with plaintiff and disposing of property, unless notice of the application is first given.[158] It is an abuse of discretion to stay the hearing on an order to show cause for six weeks from the issuance of the temporary restraining order, and thus suspend the operation of a mine for that period.[159]

§ 2848. **Writ of injunction.**—No particular form is necessary for writs of injunction. They are the same in substance everywhere. The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then at their peril obey.[160] The form of the order depends upon the facts alleged in the complaint or affidavits.[161]

152 Wilson v. Eagleson, 9 Idaho, 17, 108 Am. St. Rep. 110, 71 Pac. 613.

153 Cal. Code Civ. Proc., § 530; Hicks v. Michael, 15 Cal. 109; San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216, 35 Pac. 651.

154 Miles v. Edwards, 6 Mont. 180, 9 Pac. 814.

155 Harston's Pr., note to § 530.

156 San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216-218, 35 Pac. 651.

157 Estee's Pl. & Pr., § 4243.

158 In re Groen, 22 Wash. 53, 60 Pac. 123.

159 Wetzstein v. Boston etc. Min. Co., 25 Mont. 135, 63 Pac. 1043.

160 Summers v. Farish, 10 Cal. 347.

161 Cal. Code Civ. Proc., §§ 525, 526; Alaska Codes, pt. 4, ch. 41, §§ 383-388; Ariz. Civ. Code, pars. 2742-2745; Idaho Rev. Codes, §§ 4287, 4288; Mont. Rev. Codes, §§ 6647-6653; Nev. Comp. Laws, §§ 3206-3212; N. Mex.

§ 2849. Injunction after answer.—An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.[162] But when the answer to a bill for an injunction denies all the equity of a bill, a preliminary injunction should not be granted.[163]

§ 2850. Notice to be given.—Notice of an application by plaintiff for an injunction, when given, must be given for the length of time prescribed by section 1005 of the California Code of Civil Procedure—that is to say, five days before the time appointed for the hearing, if the court be held in the same county, otherwise ten days—unless the court prescribe a shorter time. If given for a shorter time, and the defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same, under section 532.[164] An application for an injunction should contain a description of the property sought to be protected by the decree, together with appropriate allegations of the danger of loss impending.[165]

In Idaho, where the adverse parties moved to dissolve a temporary injunction on the papers, no notice need be given plaintiff.[166] A court cannot modify a preliminary injunction without notice to the complainant.[167] The propriety of granting a restraining order without notice is within the discretion of the court,[168] except in cases affecting the flow of water in its natural channels, or in case of attempt to suspend the general and ordinary business of a corporation, when notice must first be given.[169]

§ 2851. To restrain violation of contract.—Where the joint interest of the parties to a contract in its subject-matter has not commenced, the court will not, on the allegation of one party that he is injured by the acts of the other, interfere by injunction

Comp. Laws, §§ 873-875; Or. B. & C. Codes, § 418; Utah Rev. Stats., § 3058; Wash. Bal. Codes, §§ 5413-5452; Wyo. Rev. Stats., § 4044; Colo. Mills' Stats., §§ 375, 1057, 3159.

162 Cal. Code Civ. Proc., § 528; N. Y. Code, § 609.

163 Crandall v. Woods, 6 Cal. 449.

164 Johnson v. Wide West Co., 22 Cal. 479.

165 Blackburn v. Stannard, 5 Law Rep. 250, Fed. Cas. No. 1468.

166 Meyers v. First Nat. Bank, 10 Idaho, 175, 77 Pac. 334.

167 Cherry Hill Coal Min. Co. v. Baker, 147 Cal. 724, 82 Pac. 370.

168 State v. Nicoll, 40 Wash. 517, 82 Pac. 895.

169 Cal. Code Civ. Proc., §§ 530, 531.

against the latter.[170] In an action to enjoin for breach of covenant, the injunction will only extend to breaches as to which the plaintiff shows that he requires protection. General words prohibiting any act and breach of the covenants should not be inserted; for the court does not without necessity presume there will be a violation of the covenants.[171] Where the breaches of an agreement are numerous, and, from the nature of the case, the plaintiff would be able to give evidence of but few of them, he may be allowed an injunction.[172] Thus a covenant to stop all trains at a certain station will be enforced by injunction.[173] But an injunction will not be granted to enforce or protect an illegal contract.[174]

§ 2852. To restrain the carrying on of business—Good-will.—If a party covenants that he will not carry on his trade within a certain distance, or in a certain place, within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made.[175] But this is allowed because of the utter uncertainty of any calculation of damages.[176] So if the contract names a penalty, injunction cannot be granted, but the party aggrieved must sue for the penalty, even if defendant be insolvent.[177]

A contract not to engage or practice in a business is violated by acting as an employee in such business, and such violation will be enjoined.[178] Contracts in restraint of trade were regarded with great disfavor by the common law.[179] But the doctrine, as generally held, is this: that a covenant not to exercise a trade, etc., anywhere is void, but a covenant against the same, limited to a reasonable extent of district, within which competition would be possible, is valid.[180]

170 Sloo v. Law, 1 Blatchf. 512, Fed. Cas. No. 12956.

171 Earl of Mexborough v. Bower, 7 Beav. 127; Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741, 28 Am. St. Rep. 584; Wertheimer v. Circuit Judge, 83 Mich. 56, 47 N. W. 47.

172 Niagara Falls etc. Bridge Co. v. Great Western R. R. Co., 39 Barb. 212.

173 Lindsay v. Great Northern R. R. Co., 19 Eng. L. & Eq. 87.

174 Bennett v. American Art Union, 5 Sandf. 631; Mott v. United States Trust Co., 19 Barb. 568.

175 2 Story's Equity Jurisprudence, § 722a; Giles v. Hart, 5 Jur. 1381.

176 2 Story's Equity Jurisprudence, § 722a.

177 Vincent v. King, 13 How. Pr. 238. Contra, in England: See Giles v. Hart, 5 Jur. 1381.

178 Rolfe v. Rolfe, 15 Sim. 90.

179 2 Parsons on Contracts, 254, n.

180 Martin v. Murphy, 129 Ind. 464, 28 N. E. 1118; National Benefit Co. v. Hospital Co., 45 Minn. 272, 47 N. W. 806, 11 L. R. A. 437; Lewis v. Gollner, 129 N. Y. 227, 29 N. E. 81, 26 Am. St. Rep. 516.

A distinction has been drawn between a trade and a profession; and in this case a covenant not to practice law in Great Britain has been held valid, though not without some hesitation. A covenant against violation of the law and policy of the state—for example, the Sunday law—should be peculiarly favored.[181] Injunction is the proper remedy to prevent breach of a valid contract for the sale of the good-will of a business.[182]

§ 2853. Restraint of trade.—A covenant not to run or employ, or suffer to be run or employed, a steamboat, upon any of the routes of travel on the rivers, bays, or waters of the state of California, for the period of ten years, applies not only to existing routes of travel, but to all new routes opened during the ten years.[183] An agreement in partial restraint of trade, restricting it within certain reasonable limits, or confining it to particular persons, is, if founded upon a good consideration, valid.[184] Such a contract, if it include the entire area of a state, is unreasonable and void, as against public policy.[185]

§ 2854. To restrain violation of lease.—A landlord cannot demand an injunction against a breach of covenant in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent.[186] In chancery, a bill for injunction in such case must waive forfeiture and penalty.[187] Violation of the covenant in a lease not to use the demised premises for certain purposes may be stopped by injunction, even if it is a mere matter of taste.[188] But a covenant to carry on a particular business cannot be enforced by injunction, though the tenant may be restrained from doing, or permitting to be done, anything which will prevent the premises from being used for such purposes.[189] A covenant or agreement restricting the use of any lands or tenements, in favor of other lands, creates an easement, without regard to any priority or connection of title or estate in the two parcels or their owners.[190]

181 Whittaker v. Howe, 3 Beav. 394; Dodge v. Lambert, 2 Bosw. 570.

182 Hulen v. Earel, 13 Okla. 246, 73 Pac. 927.

183 Wright v. Ryder, 36 Cal. 342, 95 Am. Dec. 186.

184 Id.

185 Id.; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36.

186 Linden v. Hepburn, 3 Sandf. 668, 5 How. Pr. 188.

187 Boteler v. Marmaduke, 3 Atk. 457.

188 Steward v. Winters, 4 Sandf. Ch. 590; Consolidated Coal Co. v. Schmisseur, 135 Ill. 371, 25 N. E. 795.

189 Cooper v. Broderick, 11 Sim. 49.

190 Whatman v. Gibson, 9 Sim.

§ 2855. To restrain violation of lease—Misuse of premises.—A tenant will be restrained from pulling down a house leased to him and building another on its site against the will of the landlord, whether the change would be an improvement or not.[191] So, also, injunction will lie to restrain a mortgagor from removing fixtures from the mortgaged premises.[192] But an injunction will not lie in favor of a landlord to restrain the removing of a house, upon the ground that the security for the rent will be impaired, unless it appears that by the removal the security will be left inadequate.[193]

§ 2856. To restrain violation of lease—Removal of crop.—Where the petition sets forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for injunction, is not sufficient, unless the insolvency of defendant, or an inability to make the rent on attachment or execution, is also pleaded.[194] One who has title to a growing crop can enjoin another, who is insolvent, from harvesting and removing it.[195]

§ 2857. To restrain violation of lease—Against lessor.—Tenants claiming that vendee of lessor threatens to build a brick wall through the offices occupied by the plaintiffs, and by so doing to make them unfit for use by the plaintiffs, may restrain the same by injunction.[196]

§ 2858. To prevent violation of easement.—Where a prescriptive highway easement is not definitely fixed, the dominant tenant is entitled to a way limited by the line of reasonable enjoyment.[197] Plaintiff may base his claim to the right to use a private road on a gift from the owner of the land, and not on a mere permissive use.[198]

§ 2859. Homestead, sale of.—An injunction will be granted restraining the sale of a homestead claimed under the laws of the

196; Schreiber v. Creed, 10 Sim. 35; Brouwer v. Jones, 23 Barb. 153.

191 Smyth v. Carter, 18 Beav. 78.

192 Dutro v. Kennedy, 9 Mont. 101, 22 Pac. 763; Stowell v. Waddingham, 100 Cal. 7, 34 Pac. 436; Miller v. Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680.

193 Perrine v. Marsden, 34 Cal. 14.

194 Gregory v. Hay, 3 Cal. 334.

195 West v. Smith, 52 Cal. 323.

196 Meyer v. First Nat. Bank, 10 Idaho, 175, 77 Pac. 334.

197 Van de Vanter v. Flaherty, 37 Wash. 218, 79 Pac. 794.

198 Franz v. Mendonca, 146 Cal. 640, 80 Pac. 1078.

United States, if the judgment on which the execution issues was recovered for a debt contracted before the homestead claim was patented.[199] A complaint setting out facts showing that a cloud upon the title to property was threatened by an execution sale of the plaintiff's homestead, and would be accomplished unless an injunction issued, sets up facts showing threatened irreparable injury, for which an injunction will be granted.[200]

§ 2860. To restrain breach of contract for services.—As a general rule, an injunction restraining a party from giving his services cannot be granted.[201] But a distinguished vocalist was enjoined from singing in a certain theater in violation of her contract with the management of another.[202]

§ 2861. Against corporations.—In California, an injunction to suspend the general and ordinary business of a corporation cannot be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of the state are a party to the proceedings.[203] But this rule does not prevent a preliminary injunction from issuing against a hydraulic mining company to restrain it from depositing its tailings and other mining debris in natural watercourses, by which such refuse is washed down upon the land of another, and without notice to the corporation.[204]

A court of equity has no jurisdiction to restrain a corporation from its operations or winding up its concerns; but it may compel the officers of the corporation to account for any breach of trust, though this jurisdiction is over the officers, and not the corpora-

199 Miller v. Little, 47 Cal. 348.

200 Roth v. Insley, 86 Cal. 134, 24 Pac. 853. See, also, Irwin v. Lewis, 50 Miss. 363; Ketchin v. McCarley, 26 S. C. 1, 4 Am. St. Rep. 674, 11 S. E. 1099.

201 Fredericks v. Mayer, 13 How. Pr. 571.

202 Lumley v. Wagner, 1 De G. M. & G. 604, 13 Eng. L. & Eq. 252; overruling Kemble v. Kean, 6 Sim. 333. To same effect, see Carter v. Ferguson, 58 Hun, 569, 12 N. Y. Supp. 580; McCaull v. Braham, 16 Fed. 37, 21 Blatchf. 278. But see, contra, Sanquirico v. Benedetti, 1 Barb. 315; Hamblin v. Dinneford, 2 Edw. Ch. 529. See, also, Fredericks v. Mayer, 13 How. Pr. 571; Cort v. Lassard, 18 Or. 221, 17 Am. St. Rep. 726, 22 Pac. 1054, 6 L. R. A. 653; Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498, 3 South. 449, 3 Am. St. Rep. 758.

203 Cal. Code Civ. Proc., § 531; N. Y. Code Civ. Proc., § 224.

204 Golden Gate Con. M. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Hobbs v. Amador etc. Can Co., 66 Cal. 161, 4 Pac. 1147.

tion itself.[205] The directors may be restrained from paying a dividend.[206]

Where relief demanded against a corporation by an individual stockholder, alleging fraud in the management, and praying for a dissolution and the appointment of a receiver, is beyond the jurisdiction of the court, incidental relief by injunction is also beyond the court's jurisdiction.[207]

§ 2862. **Against foreign corporations.**—The courts of New York will not grant injunctions to suspend the corporate franchises of a foreign corporation.[208] Nor will they, upon motion for a preliminary injunction, decide a question involving a forfeiture of corporate rights, unless it appear from the papers that serious injury will follow the refusal.[209] But directors may be restrained from committing fraudulent acts charged.[210] Preliminary injunctions against a foreign corporation may be served by leaving with the agent designated to receive service of process a copy of the writ, showing the original, and explaining its contents, and delivering to him a copy of the complaint.[211]

§ 2863. **Against sale of corporate stock.**—Injunction may issue restraining further sale of individual stock until the treasury stock is all sold.[212] A complaint in a suit to restrain the sale of corporate stock for non-payment of an assessment must aver that defendant is a corporation organized for profit.[213] The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law.[214]

205 Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Société Française etc. v. Fifteenth District Court, 53 Cal. 495, Cal. Sup. Ct. Dec. 11, 1878; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536.

206 Carpenter v. New York etc. R. R., 5 Abb. Pr. 279; Carlisle v. S. E. R. R. Co., 1 Mac. & G. 689.

207 People v. District Court, 33 Colo. 293, 80 Pac. 908.

208 Way v. Keyport Steamboat Co., 16 Abb. Pr. 320, note.

209 People v. Harlem Bridge Co., 1 Abb. Pr. (N. S.) 169, note.

210 Howe v. Deuel, 43 Barb. 505.

211 Eureka etc. Canal Co. v. Superior Court, 66 Cal. 311, 5 Pac. 490.

212 Brown v. Bracking, 11 Idaho, 678, 83 Pac. 950.

213 Humphrey v. Buena Vista Water Co., 2 Cal. App. 540, 84 Pac. 296.

214 Sullivan v. Triunfo etc. Co., 29 Cal. 585.

§ 2864. Against corporations—Continued.—A third party cannot enjoin a voluntary incorporated association from punishing one of its members for trading with plaintiff, or with others who trade with him.[215] An injunction against a corporation in a suit of stockholders to prevent the dismissal of an action at law should not be allowed.[216] Equity may enjoin persons acting as stockholders, pending proceedings to determine who are the stockholders.[217]

§ 2865. Against disposition of an insolvent's property.—A court of equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted.[218] It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would in the mean time have passed to innocent purchasers on execution sale under the judgment.[219]

Under the ordinary injunction in a creditor's suit, it is a contempt to collect money earned before service of the injunction and apply it to debts contracted for family supplies.[220] The collection of notes obtained by fraud may be enjoined.[221] Merely carrying into effect, by procuring novation, a previous assignment of a right of action is not a breach of the injunction in a creditor's suit.[222] It seems, also, that the debtor is not prevented from proceeding to judgment in a suit commenced before the injunction was issued.[223] Nor is his act, in suing for a trespass, of itself a breach of the injunction.[224]

215 Downes v. Bennett, 63 Kan. 653, 88 Am. St. Rep. 256, 66 Pac. 623, 55 L. R. A. 560.

216 Hallenborg v. Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052.

217 State v. Kennan, 35 Wash. 52, 76 Pac. 516.

218 Heyneman v. Dannenberg, 6 Cal. 376, 65 Am. Dec. 519.

219 Roth v. Insley, 86 Cal. 134, 24 Pac. 853; Porter v. Jennings, 89 Cal. 440, 26 Pac. 965; Grigsby v. Schwarz, 82 Cal. 279, 22 Pac. 1041; Wilhelm v. Woodcock, 11 Or. 518, 5 Pac. 202; Parsons v. Hartman, 25 Or. 547, 42 Am. St. Rep. 803, 37 Pac. 61, 30 L. R. A. 98.

220 Taggard v. Talcott, 2 Edw. Ch. 628.

221 Hardy v. First Nat. Bank, 46 Kan. 88, 26 Pac. 423.

222 Richardson v. Rust, 9 Paige, 180.

223 Parker v. Wakeman, 10 Paige, 485.

224 Hudson v. Plets, 11 Paige, 180.

§ 2866. Against fraudulent disposition of property.—An injunction may be granted restraining fraudulent disposition of property.[225] An injunction granted for this purpose cannot restrain the defendant from disposing of his property in a proper manner, but only from doing so with intent to defraud his creditors.[226] An injunction was modified by inserting the words "with intent to defraud," etc.;[227] but it is a question whether this is not, so far as movable property is concerned, a mere *brutum fulmen*.[228] An offer to sell goods is not a violation of an injunction against selling, but it may be good grounds for appointing a receiver.[229] Equity will enjoin any transfer of a debtor's property made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors a preference over others. But such power in the court can only be invoked in behalf of creditors who have established their claims in a court of law, and will not be exercised on behalf of mere creditors at large, whose claims are not reduced to judgment.[230]

§ 2867. To restrain court proceedings—Against bringing suit.—An order of injunction whereby the bringing of an action is restrained will be reversed, notwithstanding an injunction bond has been given.[231] The prosecution of a suit at law against the heirs is not a violation of an injunction restraining the creditor from bringing suit against the executors for the debt.[232] The common order for an injunction in an interpleading suit is irregular if it does not make the issuing of the injunction depend on the payment of the money into court.[233]

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of such in-

225 Reubens v. Joel, 13 N. Y. 488; Dickinson v. Benham, 10 Abb. Pr. 391; Lee v. Gross, 126 Ind. 102, 25 N. E. 891; Malcom v. Miller, 6 How. Pr. 456.

226 Brewster v. Hodges, 1 Duer, 610.

227 See Mitchell v. Battman, 25 Barb. 408.

228 Reubens v. Joel, 13 N. Y. 488; overruling Mott v. Dunn, 10 How. Pr. 225; Moran v. Dawes, Hopk. Ch. 375; Erpstein v. Berg, 13 How. Pr. 92. As to transfer of stock, see People v. Parker Vein Co., 10 How. Pr. 187.

229 Tyler v. Poppe, 4 Edw. Ch. 430.

230 Talbott v. Randall, 3 N. Mex. 226, 367, 5 Pac. 533.

231 King v. Hall, 5 Cal. 82.

232 Dale v. Rosevelt, 1 Paige, 35.

233 Pauli v. Von Melle, 8 Sim. 327. For other cases where injunction has been granted, see Nixdorff v. Smith, 16 Pet. 132, 10 L. Ed. 913; Gaines v. Nicholson, 9 How. 356, 13 L. Ed. 172; Kelley v. Kriess, 68 Cal. 210, 9 Pac. 129; Peterson v. Weissbein, 70 Cal. 423, 12 Pac. 415. See, also, Cal. Civ. Code, § 356.

junction or prohibition is no part of the time limited for the commencement of the action.[234]

§ 2868. To restrain court proceedings—Jurisdiction of one court over another.—In Colorado, the district court has jurisdiction of a suit to restrain a judgment of the county court.[235] The power conferred on a county court to enjoin proceedings or processes in justice's courts, in matters which have been appealed to such county court, extends only to such as are under the general jurisdiction of justices of the peace, and not to such as by section 3318 of the General Statutes fall within the special jurisdiction given them and police magistrates under city and town ordinances.[236] Equity will grant relief against an order of a probate court directing the sale of real estate, when the order is obtained by fraud and without notice to the aggrieved party.[237] One district court has no jurisdiction to enjoin a judgment of another district court. And the fact that the judge of the latter court was disqualified when the judgment was rendered does not alter the rule.[238]

§ 2869. To restrain court proceedings—To prevent multiplicity of suits.—The prosecution of a large number of suits, where the actions are groundless, and not prosecuted in good faith, should be restrained by injunction;[239] also, defendant may in the same manner prevent plaintiff's wrongful acts ripening into a right, and thus avoid a multiplicity of suits.[240]

§ 2870. To restrain court proceedings—Not to restrain criminal proceedings.—A prosecution for the violation of an ordinance will not be restrained because of its illegality, for such a fact is a defense to the prosecution;[241] nor will a prosecution for violation of a code provision relating to interference with electric lines be restrained.[242] Where property rights are involved in a

234 Cal. Code Civ. Proc., § 356.

235 People v. District Court, 33 Colo. 66, 79 Pac. 1024.

236 Hart v. Dana, 12 Colo. App. 499, 55 Pac. 958.

237 Demaris v. Barker, 33 Wash. 200, 74 Pac. 362.

238 Flaherty v. Kelly, 51 Cal. 145.

239 Jordon v. Western Union Tel. Co., 69 Kan. 140, 76 Pac. 396.

240 Boglino v. Giorgetta, 20 Colo. App. 338, 78 Pac. 612; Mendelson v. McCabe, 144 Cal. 230, 103 Am. St. Rep. 78, 77 Pac. 915; Maloney v. King, 30 Mont. 414, 76 Pac. 939.

241 Thompson v. Tucker, 15 Okla. 486, 83 Pac. 413.

242 Sullivan v. San Francisco Gas etc. Co., 148 Cal. 368, 83 Pac. 156, 3 L. R. A. (N. S.) 401.

criminal prosecution, equity will intervene, if at all, not in restraint of the criminal proceedings, but in aid of the civil jurisdiction of the court.[243]

§ 2871. To restrain court proceedings—Against counsel.—In an action brought to restrain proceedings at law, it is improper to enjoin the counsel employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights.[244]

§ 2872. To restrain court proceedings—What may be enjoined.—An injunction restrains not only the party enjoined, but other courts, on the ground of judicial comity.[245] An injunction cannot be granted affecting the rights and interests of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.[246] An injunction should never be permitted to issue when it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their claims.[247] Fraud or collusion in procuring the United States circuit court to exercise jurisdiction of an action is good ground for granting an injunction to restrain its prosecution.[248] Proceedings will not be restrained in any state court having jurisdiction in law and equity so that full justice can be done therein.[249]

Persons to whom money collected by an agent, on judgment, was paid cannot enjoin an action to recover the money, when the action is brought by the principal against the agent.[250] If plaintiff dismisses an action so as to defraud his attorneys out of their fees, they have a remedy by proceeding with the action, so as not to be entitled to enjoin the dismissal.[251]

243 Littleton v. Burgess, 14 Wyo. 173, 82 Pac. 864, 2 L. R. A. (N. S.) 631.

244 Lord Wellesley v. Earl of Mornington, 11 Beav. 180; Davis v. Mayor of N. Y., 1 Duer, 451.

245 Engels v. Lubeck, 4 Cal. 31.

246 Patterson v. Yuba County, 12 Cal. 105.

247 Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88.

248 Sawyer v. Gill, 3 Woodb. & M. 97, Fed. Cas. No. 12399; Van Vleck v. Clark, 38 Barb. 316, 24 How. Pr. 190.

249 Bennett v. Leroy, 5 Abb. Pr. 156, 14 How. Pr. 178. But see Conover v. Mayor, 5 Abb. Pr. 410.

250 Moss Mercantile Co. v. First Nat. Bank, 47 Or. 361, 82 Pac. 8, 2 L. R. A. (N. S.) 657.

251 Jackson v. Stearns, 48 Or. 25, 84 Pac. 798.

§ 2873. Against court proceedings—Adequate remedy at law.—A court of equity will not enjoin the execution of a judgment at law, upon grounds on which the party might have availed himself to defeat the action at law.[252] Where a bill in chancery was filed for the purpose of enjoining a judgment at law obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed.[253]

Where suit is pending in one court on a note of defendant, though no summons has been served and no appearance made, he cannot bring a bill in equity in another court to enjoin the collection of the note, or to cancel it, the averment being simply that he has a good defense to the note.[254] An injunction will not be granted to restrain the collection of a judgment rendered on a promissory note, for reasons which were known and should have been interposed as a defense in the suit on the note.[255] Nor will an injunction be granted to restrain the prosecution of a suit against an indorser where the note has been paid by the maker; as such payment can be set up in defense to the action.[256]

An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action.[257] Where a party failed to obtain the proper certificate of the referee, relying on verbal assurance of the attorney on the other side that he would agree to a statement, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of a court of equity to enjoin a judgment obtained against him.[258]

§ 2874. To restrain attachment sale.—A prior attaching creditor, whose attachment has been levied on the personal property of the defendant, cannot, after the recovery of a judgment, be enjoined from selling the property attached under execution, at the suit of a junior attaching creditor, unless for a sufficient con-

252 Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88.

253 Hungerford v. Sigerson, 20 How. 156, 15 L. Ed. 869.

254 Smith v. Sparrow, 13 Cal. 596.

255 Beaudry v. Felch, 47 Cal. 183.

256 Williams v. Stewart, 56 Ga. 663. See, also, Chadwell v. Jordan, 2 Tenn. Ch. 635.

257 Borland v. Thornton, 12 Cal. 440.

258 Phelps v. Peabody, 7 Cal. 50.

sideration he has bound himself to the junior attaching creditor not to do so, but to pursue some other course to depart from which would result in irreparable mischief to the plaintiff.[259]

§ 2875. To restrain execution sale.—An injunction may be granted against levying an execution upon particular articles not properly subject to it, although it may not be proper to enjoin all proceedings on the execution.[260] Courts of equity are ever ready to grant relief from sales made upon their decrees where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree as when they have been misled by a mistake of fact as to the condition of the property or estate sold, provided application be made to them in suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others.[261]

The nature and extent of the relief in such cases are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rule as to mistake of law should apply, and from such mistake courts of equity seldom relieve.[262] A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband.[263]

§ 2876. No restraint where execution is void.—If a judgment upon which an execution issues and the execution itself are void

259 Domec v. Stearns, 30 Cal. 114. As to necessity of a special clause restraining confession of judgment etc., compare McCredie v. Senior, 4 Paige, 378; Fenner v. Sanborn, 37 Barb. 610.

260 Sawyer v. Gill, 3 Woodb. & M. 97, Fed. Cas. No. 12399; Amis v. Meyers, 16 How. 492, 14 L. Ed. 1029.

261 Goodenow v. Ewer, 16 Cal. 470, 76 Am. Dec. 540.

262 Id.

263 Alverson v. Jones & Bogardus, 10 Cal. 9, 70 Am. Dec. 689; Englund v. Lewis, 25 Cal. 337; Ford v. Rigby, 10 Cal. 449; Pixley v. Huggins, 15 Cal. 127.

upon their face, an injunction will not be granted to restrain a sale of property levied on under the execution, or the issuing of any other execution on the judgment.[264] A complaint to enjoin the sale of property under an execution, and the issuance of another execution on the judgment, is devoid of equity, when it only avers that the judgment and execution are void on their face, and the insolvency of one of the defendants.[265] The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.

§ 2877. **When judgments are restrained.**—All proceedings to enjoin judgments must issue from the court having the control of such judgment.[266] To authorize the interposition of a court of chancery to enjoin a judgment at law on the ground of newly discovered facts, the proceedings must be taken by the defendant in the judgment at law.[267] Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence.[268] They will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which a party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with fault or negligence in himself or his agents, will authorize a court of equity to restrain the adverse party by injunction from availing himself of the judgment obtained at law.[269] A plaintiff who obtains a judgment in violation of his written stipulation on file dismissing the action may be restrained from enforcing it by the court in which the judgment was obtained.[270]

Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the

264 Sanchez v. Carriaga, 31 Cal 170

265 Id.

266 Gorham v. Toomey, 9 Cal. 77. See Flaherty v. Kelly, 51 Cal. 145.

267 Mulford v. Cohn, 18 Cal. 42.

268 Pico v. Sunol, 6 Cal. 294.

269 Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362; Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88; Kelley v. Kriess, 68 Cal. 210, 9 Pac. 129; Thompson v. Laughlin, 91 Cal. 313, 27 Pac. 752.

270 McLeran v. McNamara, 55 Cal. 508.

time appointed by the proper court of law, courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious.[271] If a party enters judgment for too much, or before the whole amount is due, it is not conclusive, but only *prima facie,* evidence of fraud to avoid the judgment.[272] Proceedings upon a judgment may be enjoined as to a part, and be allowed to proceed as to the residue.[273] A bill to enjoin proceedings upon a judgment at law is not in general considered an original bill.[274] If, however, new parties are introduced, and different interests are involved, it will be regarded as being to that extent an original bill.[275]

An action will lie to perpetually enjoin the execution of a justice's judgment against the plaintiff or his property, where the complaint shows that the judgment was obtained by fraud practiced upon the plaintiff by the attorneys of the defendant, who was plaintiff in the justice's court, with the assistance of the justice, and that the fraudulent judgment was concealed from the plaintiff, and that the plaintiff first learned that it had been entered against him after the time for appeal had expired, and that relief had been sought against the judgment and denied in the justice's court.[276]

§ 2878. To restrain execution.—Where realty is levied on under execution against another, a remedy at law does not cut off the right to enjoin the sale of the property.[277] Where a notice of sale on execution only described the interest of a husband in the land to be sold, the wife, who is a joint owner, is not entitled to have the sale enjoined.[278] Injunction will not issue to restrain the sheriff from selling personal property where plaintiff has no adequate remedy at law, or the defendant is insolvent.[279]

271 Phelps v. Peabody, 7 Cal. 50.

272 Patrick v. Montader, 13 Cal. 442.

273 Dunlap v. Stetson, 4 Mason, 349, Fed. Cas. No. 4164.

274 Simms v. Guthrie, 9 Cranch, 19, 3 L. Ed. 642; Dunn v. Clarke, 8 Pet. 1, 8 L. Ed. 845; Williams v. Byrne, Hempst. 472, Fed. Cas. No. 17718.

275 Simms v. Guthrie, 9 Cranch, 19, 3 L. Ed. 642.

276 Merriman v. Walton, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108, 30 L. R. A. 786. Enjoining enforcement of judgment at law, see Rice v. Tobias, 89 Ala. 214, 7 South. 765; Johnson v. Christian, 128 U. S. 374, 32 L. Ed. 412, 9 Sup. Ct. 87.

277 Gale Mfg. Co. v. Sleeper, 70 Kan. 806, 79 Pac. 648.

278 Burris v. Craig, 34 Colo. 383, 82 Pac. 944.

279 Kester v. Schuldt, 11 Idaho, 663, 85 Pac. 974.

§ 2879. To stay a mortgage lien.—Plaintiff has a deed of property from H. and P. Subsequently, N., execution creditor of H. and P., causes the sheriff to levy on the property. Plaintiff files a bill to restrain the sale, as casting a cloud on his title. The court below found plaintiff's deed to be in effect a mortgage. It was held that the bill must be dismissed; that the purchaser at the sheriff's sale would only acquire the interest of the judgment debtors, H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf.[280] But equity may restrain a sale under a deed of trust, where performance by the mortgagor is prevented by the mortgagee.[281]

Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises, under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple against Pender, and has not yet got a sheriff's deed. It is held that an injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession under the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement or sale under judgment, plaintiff cannot complain, his rights not being affected by the proceedings, as he was not a party.[282]

§ 2880. No injunction in place of motion for new trial.—Where a party moves for a new trial and fails, he cannot on the same facts go into equity to enjoin the judgment rendered;[283] nor in any case where the remedy by motion in the other

280 Purdy v. Irwin, 18 Cal. 350.

281 McCue v. Bradbury, 149 Cal. 108, 84 Pac. 993.

282 Macovich v. Wemple, 16 Cal. 104. See Quinby v. Slipper, 7 Wash. 475, 38 Am. St. Rep. 899, 35 Pac. 116; Davis v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915; McCormick v. Riddle, 10 Mont. 467, 26 Pac. 202; Roman Catholic Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343; Buell v. San Francisco Sav. Union, 65 Cal. 292, 4 Pac. 14.

283 Collins v. Butler, 14 Cal. 223.

court is ample,[284] or the facts were known, and might have been interposed as a defense.[285]

§ 2881. **Void judgment by default.**—If a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie.[286] If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same.[287]

§ 2882. **Appeal, and not injunction.**—An injunction will not be granted to perpetually enjoin the collection of a judgment upon the ground of fraud, where the judgment was upon default, and granted more relief than the plaintiff was entitled to take from the action. The remedy is by appeal, and, if void upon its face, the remedy is by motion in the court in which it is rendered.[288] Where, in a suit before a justice of the peace, defendant answers disputing plaintiff's claim, and afterwards, on a day set for trial,—plaintiff being present, but defendant absent, and no one appearing for him,—the justice renders judgment for plaintiff, without evidence, and "by default," as the docket reads, it was held that if the justice erred in his judgment, either upon the merits or as to the form, the remedy is by appeal, and that such error cannot be corrected by a bill in equity to set aside the judgment and enjoin execution and sale thereon.[289]

§ 2883. **Except where injury will be irreparable.**—Defendant, as coroner and acting sheriff, levied on and advertised for sale

284 Imlay v. Carpentier, 14 Cal. 173; Aldrich v. Stephens, 49 Cal. 676.

285 Beaudry v. Felch, 47 Cal. 183; Northeastern R. R. Co. v. Barrett, 65 Ga. 601; Fisher v. Greene, 5 Colo. 541.

286 Logan v. Hillegass, 16 Cal. 200; Gregory v. Ford, 14 Cal. 141, 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 286; Chipman v. Bowman, 14 Cal. 157.

287 Id.

288 Murdock v. De Vries, 37 Cal. 527.

289 Hunter v. Hoole, 17 Cal. 418; Comstock v. Clemens, 19 Cal. 77.

all the right, title, and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners. It was held that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency.[290]

§ 2884. **To restrain an action in ejectment.**—An injunction to stay an ejectment suit until matters of equity can be examined will not be allowed, except upon condition that judgment in the ejectment be entered.[291] Where a right to real estate has been satisfactorily established at law, a court of equity will interfere by injunction to prevent further litigation, without inquiring particularly what number of trials in ejectment have been had.[292] In an action for the possession of land, on which was standing a crop of unharvested grain, and to set aside a conveyance on the ground of fraud, it was held, first, that the grain was part of the land, and plaintiffs were entitled thereto, if entitled to recover the land; and second, that an order made by the court *pendente lite*, restraining defendants from alienating or incumbering the land during the litigation, and appointing a receiver to take possession, harvest, and preserve the grain crop, was properly made.[293]

§ 2885. **To restrain ejectment—Evidence.**—Defendants, claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring ejectment against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their bill in the same court to enjoin defendants from introducing evidence or using the survey, plat, or patent on the trial of the ejectment, until the determination of an action averred to be pending in the United States circuit court, by the United States against defendants and others claiming with them, to annul the survey, plat, and patent, on the ground of fraud in the survey and in procuring the patent, the bill also averring such fraud. It was held that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and

290 More v. Ord, 15 Cal. 206.

291 Turner v. American Baptist Missionary Union, 5 McLean, 344, Fed. Cas. No. 14251.

292 Craft v. Lathrop, 2 Wall. Jr. 103, Fed. Cas. No. 3318.

293 Corcoran v. Doll, 35 Cal. 476.

also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, have no standing in court to resist the patent.[294]

In forcible entry and detainer, defendant can show an injunction restraining plaintiff from interfering with the defendant's possession.[295] Appeal, instead of injunction, may be the relief from a judgment in forcible entry and detainer, rendered in the justice's court.[296]

§ 2886. To restrain ejectment—Execution.—After judgment for the plaintiff in ejectment, brought for non-payment of rent, the defendant cannot show, in a bill of equity brought to restrain the execution of the judgment, that the rent ought, under the stipulations of the lease, to have been reduced in amount.[297] But relief will be granted by way of injunction in equity, where the tenant has, pending the suit, acquired a title paramount to that of the demandant, if he cannot avail himself of it as a defense to the original suit at law, or cannot after recovery maintain an action to regain possession.[298]

At common law, an injunction cannot be allowed against waste, etc., in an action of ejectment. It is so held under the English statute, which resembles ours in this respect.[299] An injunction will not be allowed against a judgment in ejectment on grounds which might have been set up as a defense in the action at law.[300]

§ 2887. Forcible entry and detainer.—Where the complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined; and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during

294 Ely v. Frisbie, 17 Cal. 250.

295 Lowry v. Mitchell, 14 Okla. 241, 78 Pac. 379.

296 Beam v. Parks, 9 Ariz. 151, 80 Pac. 324.

297 Sheets v. Selden, 7 Wall. 416, 19 L. Ed. 166.

298 Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1875.

299 Baylis v. LeGros, 2 C. B. (N. S.) 322, 40 Eng. L. & Eq. 272; Storm v. Mann, 4 Johns. Ch. 21; Davenport v. Davenport, 7 Hare, 217. See People v. Mayor of N. Y., 10 Abb. Pr. 111.

300 Agard v. Valencia, 39 Cal. 292.

the pendency of that action, it was held that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases to grant first a temporary, and subsequently a perpetual, injunction does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive.[301]

§ 2888. Who may enjoin.—A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchaser and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person, who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor.[302] The fact that the suit in ejectment has been commenced against the judgment debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. Neither does the allegation that the purchaser (plaintiff in equity) has put valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a sheriff from executing a writ of restitution issued on a judgment rendered against third parties, to which judgment the plaintiff is a stranger.[303] A resident citizen or corporation assessed for, and liable to pay, or within a year having paid, a tax, within a certain political division, may sue any officer or agent of such political division to restrain any illegal expenditure of, waste of, or injury to the estate funds or other property of such political division.[304]

§ 2889. Against railroads—Condemnation of land.—Where the statute under which the proceedings for the condemnation of

301 Hicks v. Michael, 15 Cal. 107. See Leach v. Day, 27 Cal. 643. That, ordinarily, an injunction will not be granted in cases of disputed right, until the question of right is settled at law, see Gilroy's Appeal, 100 Pa. St. 5.

302 Treadwell v. Payne, 15 Cal. 496.

303 Tevis v. Ellis, 25 Cal. 516; Tomlinson v. Rubio, 16 Cal. 202, disapproved.

304 Cal. Code Civ. Proc., § 526a; Stats. 1909, p. 578.

land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not lawfully given, a perpetual injunction against opening the road will be granted.[305] A perpetual injunction against opening a road, under proceedings which have been taken, does not prevent laying out a road at any future time over the same land, whenever the proper steps are taken to acquire the right of way, and the right has been secured. Where the land was a public highway subject to the public use, though the fee was in plaintiff, and plaintiff had never received compensation for the use of the land by a railroad which was laid thereon, though it appeared that the railroad company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff, it was held that plaintiff was not entitled to an injunction to restrain the company from running its cars.[306]

§ 2890. Against railroads—Laying track in street.—Injunction will lie to restrain the construction of a track of a steam railroad in a street to the damage of an abutter, to whom no compensation has been offered.[307] But such an owner is not entitled to have enjoined the further maintenance of a railroad which was built with his express consent and request, and operated for twenty years.[308] An injunction lies at the suit of the people to restrain a railroad company from laying an extension of their track in the streets of the city without authority of law,[309] or to lay a railroad track in a peculiar case;[310] but not after the legislature has granted the right to lay the track.[311]

§ 2891. Against railroads—As nuisance.—A railroad may be a nuisance if constructed on a crowded highway.[312] The estab-

305 Curran v. Shattuck, 24 Cal. 431; Payne v. Kansas etc. R. R. Co., 46 Fed. 546; Pratt v. Roseland Ry. Co., 50 N. J. Eq. 150, 24 Atl. 1027.

306 Murdock v. Prospect Park etc. R. R. Co., 10 Hun, 598.

307 O'Connor v. Southern Pacific R. R. Co., 122 Cal. 681, 55 Pac. 688; Cereghino v. Oregon S. Line, 26 Utah, 467, 99 Am. St. Rep. 843, 73 Pac. 634.

308 Wolfard v. Fisher, 48 Or. 479, 84 Pac. 850, 87 Pac. 530.

309 People v. Third Ave. R. R. Co., 45 Barb. 63, 30 How. Pr. 121.

310 Dry Dock etc. R. R. Co. v. New York etc. R. R. Co., 30 How. Pr. 39.

311 Sixth Ave. R. R. v. Kerr, 45 Barb. 138. As to the discontinuance of part of a track, see People v. Albany etc. R. R. Co., 11 Abb. Pr. 136. As to nuisance on lands appropriated for railroad, see Bostock v. N. S. Ry., 3 Sm. & G. 283.

312 Davis v. Mayor of New York, 14 N. Y. 524-531, 67 Am. Dec. 186; State v. Nelson County, 1 N. Dak. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

lishment and running of a horse railroad in a public street imposes an additional burden on the land, and may be enjoined at the suit of an adjoining proprietor who owns to the middle of the street—that is, if the railroad company have not a right to do so.[313] But where the fee of the streets is in the city where they are located, and the city has full power to control and regulate their use, a court of equity will not at the suit of an individual enjoin a railway company from operating its road laid in the street without permission of the city, but will leave the redress to the city authorities.[314]

Injunction lies at the suit of an abutting house-owner to enjoin a street-railroad company from leaving snow, which it removed from its tracks, heaped up between them and plaintiff's premises for a longer period than is reasonable.[315] Also, an injunction may be issued to restrain defendant from running his steam-engine so close to plaintiff's premises as to jar his house.[316]

A railroad operated under the law is not liable as for a nuisance to one whose residence is permeated by smoke, cinders, and gas emitted from the engines; and this is so even though the dwelling is rendered unhealthy from such smoke and gas, unless there is constitutional or statutory relief.[317]

§ 2892. **Against railroads—Continued.**—When a railroad company is authorized to construct a road, and to take private property, upon the performance of certain conditions precedent, their entry for such purposes is a proper subject for an injunction, if the condition is not performed.[318] An injunction has been granted to prevent a change of the gauge of a railroad.[319] Where a railroad company closes up a passageway under its track, which it had agreed to maintain, on the construction of the road, but which reservation was omitted from the deed through fraud of the road's agent, such closing of the subway may be restrained by injunction.[320]

313 Craig v. Rochester City etc. R. R. Co., 39 N. Y. 404.

314 Patterson v. Chicago etc. R. R. Co., 75 Ill. 588.

315 Prime v. Twenty-third Street R. R. Co., 1 Abb. N. C. 63.

316 McKeon v. Lee, 28 How. Pr 238. Compare Middleton v. Franklin, 3 Cal. 238; McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795.

317 Atchison etc. Ry. v. Armstrong, 71 Kan. 366, 114 Am. St. Rep. 474, 80 Pac. 978, 1 L. R. A. (N. S.) 113.

318 Bonaparte v. Camden etc. R. R. Co., Baldw. 205, Fed. Cas. No. 1617.

319 Columbus etc. R. R. Co. v. Indianapolis etc. R. R. Co., 5 McLean, 450, Fed. Cas. No. 3047.

320 Moore v. Chicago etc. R. R., 7 Kan. App. 242, 53 Pac. 775.

§ 2893. Against public nuisances.—A public nuisance may be enjoined if it subjects a party to special injury.[321] An individual may have an injunction to prevent a public nuisance, when such nuisance, when created, will be an extraordinary injury, irreparable in damages, or irremediable at law, or produce a multitude of suits.[322] The extent of damages does not affect this right.[323] The complaint must show special damage to the plaintiff, and facts must be stated to show that the apprehension of injury is well founded.[324] An action to abate a nuisance is a suit in equity, and an injunction against its continuance may be issued therein, although it is not specially prayed for in the complaint.[325] A public nuisance may be restrained on application of the attorney-general.[326]

Where a bill is filed by the people, on the relation of the attorney-general, to enjoin the state treasurer from paying money out of the treasury, on the ground of the unconstitutionality of the act directing the treasurer to make the payment, and the court, on the final trial, denies the injunction, the judgment denying the injunction shall not contain a clause adjudging and decreeing that the treasurer pay over the money as required by the law.[327]

Nothing can be restrained as a nuisance which the legislature has authorized.[328] Where plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the nuisance is a physical impossibility. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.[329]

321 Milhau v. Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Woodruff v. North Bloomfield etc. Min. Co., 1 West Coast Rep. 133.

322 Parrish v. Stephens, 1 Or. 74; Esson v. Wattier, 25 Or. 7, 34 Pac. 756.

323 Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11. But see Bernheimer v. Railroad Co., 26 Abb. N. C. 88, 13 N. Y. Supp. 913.

324 Payne v. McKinley, 54 Cal. 532; Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265.

325 McMenomy v. Band, 87 Cal. 134, 26 Pac. 795.

326 Davis v. Mayor, 2 Duer, 663, 14 N. Y. 506, 67 Am. Dec. 186; Mechling v. Kittanning Bridge Co., 1 Grant Cas. 419; People v. Gold Run etc. Min. Co., 66 Cal. 155, 4 Pac. 1150.

327 People v. Pacheco, 27 Cal. 227.

328 Davis v. Mayor of New York, 14 N. Y. 506, 67 Am. Dec. 186; State v. Nelson County, 1 N. Dak. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283.

329 Attorney-General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146. As to injunctions for nuisances generally, see McCord v. Iker, 12 Ohio, 387; Spooner v. McConnell, 1

Injunction will not lie at the suit of a private person to protect public interests.[330] Where defendant commissioners of public lands threatened to lease certain public land adjoining a city, and the occupation of such lands by the lessees would constitute a nuisance, by contaminating the water supply of the city, an action cannot be maintained by a taxpayer to enjoin the commissioners from making the lease.[331] Nor can a taxpayer enjoin the payment of bills and salaries of certain grain inspectors on the ground that the law authorizing their payment is unconstitutional.[332]

§ 2894. Against appropriation of public street.—Where plaintiff seeks an injunction to restrain the appropriation of a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him is not sufficient. But if no motion is made to require the plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived.[333] The breaking up of the street of a town for the purpose of laying gas-pipes, without lawful authority, is not such a nuisance as will be enjoined in equity, on an information at the relation of a rival gas company.[334]

§ 2895. Against change of street-grade.—In an injunction to restrain the material change of a street-grade, plaintiff is only entitled to such injunction on executing a bond as required by statute; but it may be an abuse of discretion of the trial court to require an additional bond at the request of the street contractor.[335] A road-overseer may be enjoined from repairing a road in such a manner as to injure one owner and to serve private ends.[336] An order of injunction may be amended so as to admit work on a previously established grade; but a street-grade may

McLean, 337, Fed. Cas. No. 13245; Bemis v. Upham, 13 Pick. 169.

330 Ruthstrom v. Peterson, 72 Kan. 679, 83 Pac. 825.

331 City of Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186.

332 Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37.

333 Wetmore v. Story, 22 Barb. 414, 3 Abb. Pr. 262.

334 Attorney-General v. Cambridge Consumers Gas Co., L. R. 4 Ch. 71.

335 Swope v. Seattle, 35 Wash. 69, 76 Pac. 517.

336 Shanks v. Pearson, 66 Kan. 168, 71 Pac. 252.

be changed after the damage to abutting property-owners has been ascertained and paid.[337]

§ 2896. Against obstructing highways.—It is material for a complaint suing for injunction to prevent a threatened destruction of a river to state that he is engaged in navigating the waters of the same.[338] A bill was filed to restrain a railway company from placing an obstruction partly on a public way and partly on the land of the plaintiff, a rival railway company, so as to block up the access to a station of the plaintiff, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer, it was held that this was a case in which the court would enjoin trespass by a stranger.[339] But where a railroad company was chartered with the privilege of running its road from such a point within an incorporated city as the city officers should designate, and a point was designated, and the railroad authorized to lay its tracks along certain streets, it was held that no public nuisance was thereby created, and that a court of equity would not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, where no private injury or threatened injury was alleged to such citizens or their property.[340] It is, however, the settled law of Wisconsin that an obstruction which prevents a lawful use of a public highway, besides being a public nuisance, is a special injury to adjoining lot-owners, against which, when threatened, they may have an injunction.[341]

A purchaser of land with reference to a plat is not entitled to enjoin the closing of a street unless special injury will come to him by such action.[342] An abutting owner on a highway has no right to an injunction restraining an obstruction opposite his premises which does not interfere with his right of access.[343] Road supervisors do not have the exclusive authority to enjoin the obstruction of a highway. Suit may be brought in the name of the county.[344]

337 Hart v. City of Seattle, 42 Wash. 113, 84 Pac. 640.

338 Spooner v. McConnell, 1 Mc Lean, 337, Fed. Cas. No. 13245.

339 London etc. R. R. Co. v. Lancashire etc. R. R. Co., L. R. 4 Eq. 174.

340 Coast Line R. R. Co. v. Cohen, 50 Ga. 451.

341 Pettibone v. Hamilton, 40 Wis. 402.

342 Thorpe v. Clanton, 10 Ariz. 94, 85 Pac. 1061.

343 Ruthstrom v. Peterson, 72 Kan. 679, 83 Pac. 825.

344 Lincoln County v. Fish, 38 Wash. 105, 80 Pac. 435. See, also,

§ 2897. **Against obstructing highways — Continued.** — In an action to abate an obstruction on a public road, a record of the board of supervisors, to be admissible, must concern the road on which the obstruction is.[345] An owner of land abutting on a highway may sue to enjoin a permanent obstruction thereof without alleging that it is his sole means of egress and ingress.[346]

Fences constructed across a highway by the owner of the land, to prohibit public travel thereon, are a nuisance, which the road supervisors may abate.[347] Where, in an action against a grantee of the owner to abate a nuisance, consisting of a fence erected by her on a strip of land, on the ground that the strip had been dedicated by her grantor as a highway, the defense was that there was no dedication, but that the survey and map were made merely that the map might be referred to in conveyances, to insure certainty of description, and the court found that the strip was not a highway, findings that the strip was not a continuation of the county road, and that it was not dedicated to the public by the owner, and not abandoned to the public, were not necessary.[348]

§ 2898. **To protect commerce.**—A nuisance injurious to the commerce of a town may be enjoined at the suit of a private individual owning property in such town, and being himself engaged in its commerce.[349] An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce, without the regularity or purpose of ferry trips; that remedy applies only to one which is run avowedly as a ferry-boat.[350]

§ 2899. **Against building a wharf.**—Where the court is satisfied that a wharf erected in tide-waters, and upon soil thereunder belonging to the state, is not a nuisance, an injunction should be refused, or dissolved, if one has been temporarily

Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43.

345 Shepherd v. Turner, 129 Cal. 530, 62 Pac. 106.

346 Dyche v. Weichselbaum, 9 Kan. App. 360, 58 Pac. 126.

347 Whittaker v. Ferguson, 16 Utah, 240, 51 Pac. 980.

348 Smith v. Glenn, 129 Cal. xviii, 62 Pac. 180.

349 Works v. Junction Railroad, 5 McLean, 425, Fed. Cas. No. 18046.

350 Conway v. Taylor, 1 Black, 603, 17 L. Ed. 191; Hunter v. Moore, 44 Ark. 184, 51 Am. Rep. 589.

granted. The district courts, as courts of equity, have no power to decree the destruction, or to enjoin a purpresture caused by the erection of a wharf in tide-waters, and upon the soil thereunder belonging to the state, without a license from the state, unless it is, or will be, a public nuisance, or is, or will be, followed by some form of irreparable damage, or unless it is, or will be, a hindrance to the execution of some legislative act relating to fishery or to commerce or navigation.[351] A person who is the owner and in possession of a private wharf is entitled to a perpetual injunction restraining the construction of another wharf in front of his which will cut off his wharf from the navigable waters, unless the persons constructing the same show a lawful right, proceeding from competent authority, to erect the proposed wharf; and a statute authorizing such construction must be strictly followed.[352]

The remedy to prevent erecting a nuisance in a bay or navigable river is by injunction at the suit of the attorney-general.[353] But an injunction will not be granted to restrain the erection of what may possibly prove a nuisance.[354]

§ 2900. **Against obstructing navigable waters.**—An action may be maintained by a private citizen to restrain the construction of a nuisance in navigable waters.[355] Where defendant denies the navigability of a slough and plaintiff's right to use it for the transportation of logs, plaintiff's damages are not limited to the cost of removing defendant's obstructions and damages for delay while the same are being removed.[356] The defendant, in a suit to enjoin the construction of a certain boom in a river, is not estopped to dispute the character of certain alleged tide-lands by recitals in certain deeds.[357]

Forfeiture by an irrigation company of the right to divert the waters of a certain river may be properly declared where more than five years elapse from the dissolution of an injunction originally granted, where the work was still incomplete.[358] An

351 People v. Davidson, 30 Cal. 379.

352 Cowell v. Martin, 43 Cal. 605.

353 People v. Vanderbilt, 26 N. Y. 287, 28 N. Y. 396, 84 Am. Dec. 351.

354 Ramsay v. Riddle, 1 Cranch C. C. 399, Fed. Cas. No. 11544.

355 Small v. Harrington, 10 Idaho, 499, 79 Pac. 461.

356 Creech v. Humptulips Boom etc. Co., 37 Wash. 172, 79 Pac. 633.

357 Sengstacken v. McCormac, 46 Or. 171, 79 Pac. 412.

358 United States v. Rio Grande Dam etc. Co., 13 N. Mex. 386, 85 Pac. 393.

allegation in a complaint in a suit to restrain the obstruction of a stream is not insufficient when it states that the stream was not navigable in its natural state.[359]

§ 2901. **Against constructing fish-trap.**—In a suit to enjoin the construction of a trap upon a fishing location, claimed to have been abandoned by the owner, plaintiff could not show that another than defendant was the real owner of the location.[360]

§ 2902. **Against running a ferry.**—A ferry-owner prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry, under an illegal license granted by the county judge, within a mile of the first established ferry.[361]

§ 2903. **Against diversion of water.**—Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary to their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict, and judgment for damages. It was held that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce, in equity, plaintiffs' alleged right to one thousand inches of water on the sole ground that it was adjudged as their right in the former suit.[362] In Rhode Island, an injunction was granted to restrain the diversion of the water of a stream by a canal, made by citizens of that state, whereby mills in Connecticut were injured, the suit being brought by the owners of the mills in Connecticut.[363]

359 Monroe Mill Co. v. Menzel, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272.

360 Womer v. O'Brien, 37 Wash. 9, 79 Pac. 474.

361 Chard v. Stone, 7 Cal. 117. See Pittsburgh etc. R. R. Co. v. Jones, 111 Pa. St. 204, 2 Atl. 410, 56 Am. St. Rep. 260; Town of Golconda v. Field, 108 Ill. 419.

362 McDonald v. Bear River etc. Water etc. Co., 15 Cal. 145.

363 Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas.

A county owning land near a river, but not bordering on it, has property "adjacent" to the river, for the purpose of an action to enjoin the discharge of debris therein to the damage of plaintiff's property.[364] The fact that adjudication proceedings were had in another county as to the same waters does not preclude the court from assuming jurisdiction.[365]

A riparian owner is entitled to enjoin the sale and piping of water beyond the watershed of a stream, and without showing damages to himself.[366] Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper.[367] Where the right of the use of running water is based on appropriation, and not upon ownership of the soil, priority of appropriation gives the superior right.[368] Possession or actual appropriation must be the test of priority in all claims to the use of water.[369]

§ 2904. Against diversion of water—To protect water for mining.—A complaint alleging that plaintiff had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and was in the peaceable possession thereof, when defendants wrongfully diverted the same, and deprived plaintiff thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction.[370] Where plaintiff owns a mining ditch, with right of way for it, having acquired such right by priority of location, the court should not, in an action to enjoin another party from washing it away, limit the plaintiff's right by allowing the ditch to be washed away, if defendant would build a flume or other aqueduct to replace it; but should

No. 13446. See, also, Horsky v. Helena etc. Water Co., 13 Mont. 229, 33 Pac. 689; City of Salem v. Salem etc. Min. Co., 12 Or. 374, 7 Pac. 497. When injunction not granted, see McBroom v. Thompson, 25 Or. 559, 42 Am. St. Rep. 806, 37 Pac. 57; Wintermute v. Tacoma etc. Water Co., 3 Wash. 727, 29 Pac. 444.

364 Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

365 Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431.

366 Southern California Investment Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767.

367 Marius v. Bicknell, 10 Cal. 217. See, also, Olmsted v. Loomis, 9 N. Y. 428.

368 Ophir S. M. Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550.

369 Kimball v. Gearhart, 12 Cal. 29; Nevada County etc. Canal Co. v. Kidd, 37 Cal. 283.

370 Tuolumne Water Co. v. Chapman, 8 Cal. 392. See Jatunn v. O'Brien, 89 Cal. 57, 26 Pac. 635; Allen v. Water Co., 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93.

enjoin the washing away of the ditch.[371] No equitable remedy can be had for a mere past diversion of a watercourse; but when the injury is continuing, relief may appropriately be sought in equity.[372]

Plaintiffs are owners of mining claims located in the bed of a creek, and defendants are owners of claims situated on a hill in the vicinity. The refuse water from defendants' claims becomes deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were located first, and are valuable only for the gold they contain, and thus plaintiffs are entitled to damages for the injuries done their claims by such deposits, and to an injunction against the same in future. The enjoyment of their claims lies in the use necessary to obtain the gold, and to interrupt this use is to take away the opportunity to enjoy, and in that much defeat, the object of their location and possession.[373]

An upper riparian owner must not use the water for placer mining in such a manner as to cover the lower proprietor's land with debris, sand, gravel, or other materials, so as to render it valueless. Such is a nuisance at common law and under the code.[374] Where the deposit of tailings from defendant's quartz-mill in a creek during the irrigation season practically destroyed plaintiff's farm, he is entitled to restrain such pollution.[375]

§ 2905. Against diversion of water—Obstructions by dams, etc.—Where the obstruction of a stream did not constitute a nuisance at the commencement of the action, the court properly enjoined the removal of the obstruction, and refused to enjoin the obstruction of the stream.[376] A mandatory injunction to remove a nuisance caused by defendants, injuring plaintiff's land, is authorized without a finding as to damages.[377] Plaintiff may enjoin the damming of a stream above his land to float out logs.[378] A decree in an action to enjoin the diversion of water of

371 Gregory v. Nelson, 41 Cal. 278.

372 Tuolumne Water Co. v. Chapman, 8 Cal. 392.

373 Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90.

374 Chessman v. Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410.

375 Brown v. Gold Coin Min. Co., 48 Or. 277, 86 Pac. 361.

376 Winsor v. Hanson, 40 Wash. 423, 82 Pac. 710.

377 Allen v. Stowell, 145 Cal. 666, 104 Am. St. Rep. 80, 79 Pac. 371, 68 L. R. A. 223.

378 Bryant v. Frank H. Lamb Timber Co., 37 Wash. 168, 79 Pac. 622.

a stream may in no way infringe defendant's right, and, in an action by a mill-owner to enjoin the diversion of water, plaintiff's right to the use of water is not limited to periods of the year during which the flow is sufficient to operate his mill.[379]

An upper riparian owner whose operations of a mine are interfered with by a dam constructed below is entitled to an injunction.[380] Mere proof of ownership or of an interest in a placer-mining claim is enough to show a right to the use of waters adjacent thereto.[381] A decree is not objectionable as unqualifiedly prohibiting the diversion of water between certain dates.[382]

§ 2906. Against diversion of water—Obstruction of drainage.—Plaintiff is entitled to injunction to restrain defendant from diverting water into a certain stream.[383] Under certain circumstances, the objection of laches should not be urged in a suit to enjoin the obstruction of a river by a dam impeding the drainage of land. Such an obstruction and delaying of planting of crops is an irreparable injury which ought to be enjoined.[384]

§ 2907. Against diversion of water—Obstruction—Defenses and damages.—Defendant is not entitled to rely on a mere equitable right to waters diverted, which right was acquired from plaintiff's grantor, in absence of proof and a finding of actual or constructive notice to the plaintiff.[385] Plaintiff having suffered no appreciable damages by defendant's diversion of water from a stream, and having an adequate remedy at law for any damage suffered, cannot have an injunction to restrain such diversion.[386] The measure of permanent damages for the pollution of water of a stream is the difference between the value of the land prior to the injury and its value after it.[387]

In an action to enjoin interference with the flow of water in the channel of a stream to plaintiff's premises, to which the

379 City of Telluride v. Blair, 33 Colo. 353, 80 Pac. 1053.

380 Kane v. Littlefield, 48 Or. 299, 86 Pac. 544.

381 Leggat v. Carroll, 30 Mont. 384, 76 Pac. 805.

382 Medano Ditch Co. v. Adams, 29 Colo. 317, 68 Pac. 431.

383 Ladd v. Bedle, 12 Wyo. 362, 75 Pac. 691.

384 Krause v. Oregon Iron etc. Co., 45 Or. 378, 77 Pac. 833.

385 Churchill v. Russell, 148 Cal. 1, 82 Pac. 440.

386 Mann v. Parker, 48 Or. 321, 86 Pac. 598.

387 Watson v. Colusa-Parrot Min. Co., 31 Mont. 513, 79 Pac. 14.

statute of limitations was imposed as a defense, the defendant's use of the water does not toll plaintiff's right to it.[388]

§ 2908. Against diversion of water—Punishment and parties.—The successor in title to a party to a decree determining rights in water, by asserting those rights as his, under the decree, makes himself a party, and liable to contempt proceedings for the violation of the injunction.[389] Where several landowners agree to construct their own ditch and make a joint application to a ditch company for water as one applicant, they may join as plaintiffs to compel the water company to deliver the water.[390]

§ 2909. Against diversion of irrigation water.—The right of using an irrigation ditch for the benefit of one's own land may exist, though he can enjoy the same only by procuring a right of way through intervening lands.[391] Plaintiff in an action to enjoin defendant from discharging water on his land through a ditch is entitled to no relief on a finding that defendant had not at all times maintained it in proper condition.[392]

An injunction will be granted to prohibit the continuance of an action which obstructs a landowner from the free use of his land, where such act will, if allowed to continue, ripen into an easement; and the fact that the land on which the ditch is constructed is of no appreciable value is no defense to plaintiff's right to enjoin.[393]

The burden of proof is on the plaintiff seeking to enjoin the diversion of water by an irrigation ditch to show an abandonment of the priority previously awarded thereto. Plaintiff suing to restrain the application of water to remote lands, so as to get the return of seepage, is not entitled to relief.[394]

§ 2910. Against diversion of water for irrigation.—The construction of a reservoir across the bed of a ravine for the purpose of collecting the water flowing down the same, to be used in irrigating a garden or fruit-trees, gives the party constructing

388 Harrington v. Demaris, 46 Or. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756.

389 State v. District Court, 34 Mont. 258, 86 Pac. 798.

390 Helphery v. Perrault, 12 Idaho, 451, 86 Pac. 417.

391 Blankenship v. Whaley, 142 Cal. 566, 76 Pac. 235.

392 Abbott v. Pond, 142 Cal. 393, 76 Pac. 60.

393 Vestal v. Young, 147 Cal. 721, 82 Pac. 383.

394 Platte Valley Irr. Co. v. Central Trust Co., 32 Colo. 102, 75 Pac. 391.

the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he cannot be divested by persons subsequently entering for mining purposes; and a court of equity will enjoin miners thus entering from injuring the reservoir or diverting the water therefrom.[395] When there is no pretense that any injury was occasioned willfully by the defendant, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of his right to irrigate his crops, although an annoyance or injury may be thereby occasioned to the plaintiffs.[396]

§ 2911. **Against the obstruction of percolating water.**—Where plaintiffs appropriated, possessed, and used a spring of running water upon land which they occupied, and defendants dug a well upon adjoining land occupied by them, and after the digging of the well the spring dried up, since there was no visible connection between the well and the spring, the flow of water into defendants' land being by percolation, it was held that plaintiffs had no cause of action, either for damages or injunction.[397]

§ 2912. **Against obstructing flow of water from springs.**—In an action to restrain the obstruction of the flow of water from certain springs, it is proper to inquire as to the existence and number of the springs and defendant's use of the water.[398]

§ 2913. **Against obstruction of water for public use, etc.**—Plaintiff may prevent a threatened interference with a right to use water from a stream and to operate its pipe-line.[399] A court cannot decree the regulation of artificial works constructed by defendant, but only the restoration of the natural conditions.[400] An injunction restraining the use of machinery capable of pumping more than a certain amount of water is plaintiff's only remedy where he cannot otherwise ascertain when he is being injured.[401] The owner of waterworks erected under an ordinance granting a

395 Rupley v. Welch, 23 Cal. 452.

396 Gibson v. Puchta, 33 Cal. 310. As to enjoining destruction of levee, see Belcher v. Murphy, 81 Cal. 39, 22 Pac. 264; Grimshaw v. Belcher, 88 Cal. 217, 22 Am. St. Rep. 298, 26 Pac. 84.

397 Mosier v. Caldwell, 7 Nev. 363.

398 Town of Suisun v. DeFreitas, 142 Cal. 350, 75 Pac. 1092.

399 Everett Water Co. v. Powers, 37 Wash. 143, 79 Pac. 617.

400 Mace v. Mace, 40 Or. 586, 67 Pac. 660, 68 Pac. 737.

401 Salem Flouring Mill v. Lord, 42 Or. 82, 69 Pac. 1033, 70 Pac. 832.

franchise for twenty years may enjoin the city from taking the plant in an unlawful manner after the expiration of the term.[402]

In a suit to restrain the diversion of water from a stream, a prohibitive injunction should not be granted, unless adequate remedy cannot be had at law. A single suit may be brought against several defendants to restrain a diversion of water, though the defendants are not acting in concert and are not joint tort-feasors. And purchasers of certain rights to water flowing through a tunnel constructed by other defendants are proper parties. Plaintiff has a complete remedy by mandatory injunction compelling the restoration of the water, even though it is found that, of the fifteen inches diverted, the defendant is responsible for only two and one-half inches of the water.[403]

§ 2914. **Against stopping work of mine.**—If the plaintiffs permit the defendants to remain in possession of a mining claim several months without interference, they working it as their own, and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or entertain a preliminary injunction to stop the work. When the title of the property is in dispute, the question whether the defendants are solvent and able to respond in damages forms an important element in passing upon an application for an injunction pending the litigation.[404]

§ 2915. **Against a private nuisance—Slaughterhouse.**—Where a nuisance results from defendant's neglect in the maintenance of his property, it is no defense that the nuisance is intermittent. A decree enjoining defendant from conducting his business (a slaughterhouse) as a nuisance, "to the injury of the plaintiff and other residents" of the surrounding property, does not enjoin the operation of the business in a proper manner.[405]

§ 2916. **Against nuisance—House of prostitution.**—Equity may enjoin the maintenance of a bawdy-house at the suit of an adjoin-

402 City of Leavenworth v. Leavenworth etc. Water Co., 69 Kan. 82, 76 Pac. 451.

403 Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

404 Real Del Monte Co. v. Pond etc. Min. Co., 23 Cal. 82; Hess v. Winder, 34 Cal. 270.

405 Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055.

ing property-owner, the legal remedy not being as full as the injunction, and there is a continuing injury which is unaffected by a lapse of time. It is no defense that the municipal authorities tolerate the same on defendant's property, or that it was so used before complainant purchased the property. The adjoining property-owner suffers special damage, and is entitled to enjoin the maintenance of the bawdy-house, though it is a public nuisance.[406] The owner of a vacant lot on which he intends to build is entitled to enjoin the use of an adjoining premises as a house of prostitution.[407]

§ 2917. **Against nuisance—Parties, etc.**—One who builds and sells a saw-mill cannot enjoin its operation, though soot and ashes therefrom form a private nuisance to his residence.[408] Where a tenant had no adequate remedy at law for the abatement of a nuisance, in the shape of a shooting-gallery, maintained in an adjoining room of his hotel building, which was not an injury to the freehold, it was no defense that the complainant was a tenant, and not the owner, of the premises occupied by him; and the complaint in such suit is sufficient to justify a temporary injunction, though it fails to allege damage in any specific sum.[409] The fact that one owns land in the vicinity of public land to which exclusive right is asserted by another does not render the injury resulting to him such as to entitle him to an injunction.[410]

§ 2918. **Against nuisance—Evidence.**—Evidence of depreciation of value of the plaintiff's property from a nuisance is not admissible to show the existence and gravity of the nuisance complained of.[411]

§ 2919. **Abatement of nuisance.**—The prevention of abatement of a nuisance by injunction is within the equitable jurisdiction of the superior court. Voluntary abatement of a nuisance, pending suit to abate the same, does not deprive the court of the right

406 Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

407 Dempsie v. Darling, 39 Wash. 125, 81 Pac. 152.

408 Woodard v. West Side Mill Co., 43 Wash. 308, 86 Pac. 579.

409 Grantham v. Gibson, 41 Wash. 125, 111 Am. St. Rep. 1003, 83 Pac. 14, 3 L. R. A. (N. S.) 447.

410 Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L. R. A. (N. S.) 733.

411 Meek v. DeLatour, 2 Cal. App. 261, 83 Pac. 300.

to fix damages allowable and to disregard the verdict of the jury.[412]

§ 2920. Against trespass.—An injunction prohibiting a landowner from driving trespassing stock off his own premises or protecting his own crops against them cannot be had.[413] Injunction will not be granted to restrain the removal of timber from land under a contract, where the contractor is not insolvent, and the remedy by damages will be adequate.[414] But a trespasser, though he be solvent, who under claim of right forcibly enters on land of another and digs up the soil, and builds a brick wall to exclude the owner, may be enjoined.[415] Courts of equity should hesitate before restraining trespass under color of right or claim of title.[416]

An injunction will not issue primarily to prevent a threatened ouster of one in possession of real estate or the destruction of his furniture.[417] An owner of land abutting a private way is entitled to an injunction restraining the destruction of a fence thereon, without regard to ownership of the fee to the center of the strip.[418] Evidence may be held sufficient to enjoin defendants from willfully herding cattle on plaintiff's inclosed land, regardless of the fact that plaintiff's fence is unlawful and incloses public land.[419]

One who continually rides on a railroad track with a bicycle may be enjoined.[420] The sinking of a mining shaft by a trespasser is not such an irreparable injury as to authorize injunction.[421]

§ 2921. Against trespass—Discretion of court.—The granting and continuing of injunctions in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irrepa-

412 McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 Pac. 7.

413 Addington v. Canfield, 11 Okla 204, 66 Pac. 355.

414 Thacher Wood etc. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199.

415 Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828.

416 Shields v. Johnson, 10 Idaho, 454, 79 Pac. 394.

417 Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044.

418 Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646.

419 Martin v. Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

420 Atchison etc. Ry. Co. v. Spaulding, 69 Kan. 431, 105 Am. St. Rep. 175, 77 Pac. 106, 66 L. R. A. 587.

421 King v. Mullins, 27 Mont. 364, 71 Pac. 155; Harley v. Montana Ore-Purchasing Co., 27 Mont. 388, 71 Pac. 407.

rable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured.[422] A trespasser, as such, is not subject to the control of a court of equity by injunction.[423] In a California case,[424] the supreme court refused to interfere with the discretion of the court below in denying an injunction sought by a settler upon public mineral lands to protect his improvements — a dwelling-house, milkhouse, barn, garden, dam, etc. — against miners who were working the bed of a ravine a short distance in front of the house.

§ 2922. Against trespass — Tearing down fences. — When a complaint in an action to restrain the commission of trespass avers that the defendant has torn down the fences of plaintiff and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a board of supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a court of law has decided against him, it does not state facts sufficient to constitute a cause of action.[425] Courts of equity may restrain the commission of a trespass about to be committed by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the board of supervisors prematurely made.[426] The threatened injury must be irreparable,[427] and irremediable.[428] An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered is a sufficient statement of title in a suit for injunction to restrain trespass.[429]

§ 2923. Against trespass—When injunction does and does not lie.—An injunction lies to restrain the persistent commission of trespasses, even of a mere personal nature, where they affect a corporate franchise.[430] And where the injury is in its nature

422 Hicks v. Compton, 18 Cal. 206.

423 Heaney v. Butte etc. Mining Co., 10 Mont. 590, 27 Pac. 379.

424 Slade v. Sullivan, 17 Cal. 102.

425 Leach v. Day, 27 Cal. 643.

426 Grigsby v. Burtnett, 31 Cal. 406; More v. Massini, 32 Cal. 590.

427 Hart v. Mayor, 9 Wend. 571; Jerome v. Ross, 7 Johns. Ch. 315.

428 Spooner v. McConnell, 1 McLean, 337, Fed. Cas. No. 13245.

429 Hicks v. Compton, 18 Cal. 206.

430 Stage Horse Cases, 15 Abb. Pr. (N. S.) 51.

a continuing one, and the remedy at law be by successive suits, and an action for damages will be wholly inadequate to protect plaintiff's rights, he will not be put to his remedy at law.[431]

When the complaint alleges that plaintiff settled on a tract of land, "the same being public land of the United States"; that subsequently H., a foreigner, built a house on and occupied a portion of the tract; and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation, it was held that the plaintiff sets forth no principle on which to base a claim.[432] For an apprehended trespass, unless under very special circumstances, injunction will not be allowed.[433] But injunction cannot be granted if the trespass be completed,[434] or plaintiff has a complete and adequate remedy at law.[435] Trespass of itself may not be enjoined, if no waste is committed.[436] Repeated trespasses are not of themselves sufficient to justify an injunction.[437] But if defendants are doing and threatening to continue acts which will destroy the plaintiff's growing crops, and render valueless a number of acres of valuable land, it is a case of irreparable injury, and an injunction should issue.[438] So injunctions will be granted in favor of minors to prevent the substance of the estate from being injured or carried away.[439]

A threatened act of a party which disturbs the possession of another, and which, if permitted to continue, would ripen into an easement, is sufficient to entitle the party disturbed to an injunction.[440] The complaint in an action to enjoin the commission of trespasses upon land is defective when the trespasses

431 Shimer v. Morris Canal etc. Co., 27 N. J. Eq. 364; Smith v. Gardner, 12 Or. 221, 53 Am. St. Rep. 342, 6 Pac. 771; Lee v. Watson, 15 Mont. 228, 38 Pac. 1077; Wheelock v. Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. 405; Tantlinger v. Sullivan, 80 Iowa, 218, 45 N. W. 765.

432 O'Connor v. Corbitt, 3 Cal. 370.

433 Examples of sufficient circumstances: Mayor of New York v. Conover, 5 Abb. Pr. 178; Marshall v. Peters, 12 How. Pr. 218.

434 Moreland v. Richardson, 22 Beav. 604; Ewing v. Rourke, 14 Or. 514, 13 Pac. 483.

435 Leach v. Day, 27 Cal. 643.

436 Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282.

437 Mechanics' Foundry v. Ryall, 62 Cal. 416.

438 Schneider v. Brown, 85 Cal. 205, 24 Pac. 715.

439 Allen v. Dunlap, 24 Or. 229, 33 Pac. 675; Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Hobbs v. Amador etc. Canal Co., 66 Cal. 161, 4 Pac. 1147.

440 Walker v. Emerson, 89 Cal. 456, 26 Pac. 968; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11

are pleaded in general allegations only.[441] It must be shown how and why the trespasses will be irreparable in their nature.[442]

§ 2924. Against trespass on mineral land.—Where a bill avers that the plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent and threaten to and will enter upon said land, and by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiffs' title, injunction lies.[443] In an action for a trespass upon a mining claim, where the complaint avers that defendants are working upon and extracting the mineral from the claim, and prays for perpetual injunction, and the answer admits the entry and work, and takes issue upon the titles, if the jury to whom the issue of title is submitted find in favor of the plaintiff, it is the duty of the court to decree the equitable relief sought, and enjoin defendants from future trespasses.[444] But the court should not extend it to land not owned by the plaintiff, although included in the complaint.[445] Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises, for the purpose of extracting the gold.[446] A writ of injunction will lie to restrain trespass in entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law.[447] Injunction should not be granted to restrain a mere trespass to real property unless the bill clearly avers a good title in the plaintiff; nor generally, even then, where the injury is not destructive of the substance of the inheritance, or of that which gives it its chief value, or is not irreparable, but may be compensated in damages.[448]

441 Wilkeson etc. Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307.

442 Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703; Watson v. Ferrell, 34 W. Va. 406, 12 S. E. 724.

443 Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

444 McLaughlin v. Kelly, 22 Cal. 211.

445 Moore v. Massini, 43 Cal. 389.

446 Boggs v. Merced Mining Co., 14 Cal. 379; Henshaw v. Clark, 14 Cal. 464.

447 Merced Mining Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262.

448 McMillan v. Ferrell, 7 W. Va. 223. See Smith v. Gardner, 12 Or. 221, 53 Am. Rep. 342, 6 Pac. 771; Lembeck v. Nye, 47 Ohio St. 336, 21

§ 2925. Against committing waste—Timber.—An injunction will issue to restrain waste committed by one who contracted with the owner to remove certain timber.[449] The purchaser of an interest of heirs in real estate of a deceased person is not entitled to a summary order restraining waste in probate proceedings for the settlement of the decedent's estate.[450] In an action for waste in cutting timber, it may be questionable whether an injunction is proper as to timber already cut; but the court may require the defendant (having acquired jurisdiction) to give security to account as a condition of modifying the injunction in this respect.[451]

§ 2926. Against committing waste — Injury irreparable. — Plaintiff takes up two hundred and twelve acres of land under the possessory act of this state, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses—claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sues for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: "We the jury, award the plaintiff forty-two dollars damages." Judgment accordingly, the court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit. It was held that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespassers should issue; that the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him.[452]

Entry upon land and digging up and removing fruit-trees growing upon it is waste, and an injury to the inheritance, and are acts which a court of equity may enjoin.[453] When an injunction is sought to restrain irreparable injury to the inheritance from a

Am. St. Rep. 828, 24 N. E. 686, 8 L. R. A. 578.

449 Elliott v. Bloyd, 40 Or. 326, 67 Pac. 202.

450 Adams v. Slattery, 36 Colo. 35, 85 Pac. 87.

451 Weatherby v. Wood, 29 How. Pr. 404.

452 Daubenspeck v. Grear, 18 Cal. 443.

453 Silva v. Garcia, 65 Cal. 591, 4 Pac. 628; Duncombe v. Felt, 81 Mich. 333, 45 N. W. 1004.

trespass threatened, in the nature of waste, the complaint need not allege the insolvency of the defendant.[454]

§ 2927. **Against committing waste—By mortgagor.**—Where the mortgagor, in possession, threatens waste which involves irreparable injury to the land, and will render the security inadequate, the mortgagee is entitled to an injunction to stay waste without alleging the insolvency of the mortgagor.[455]

An injunction will be granted, at the suit of the mortgagee of real property, to restrain the commission of waste upon the mortgaged premises; but before it is granted, it must be made to appear that the commission of the threatened waste will materially impair the value of the mortgaged property, so as to render it inadequate security for the mortgaged debt, and that the defendants are insolvent or unable to respond in damages for the threatened injury.[456] So a mortgagor in possession may be restrained from waste.[457] But the mortgagee of a lot on which a house is standing cannot enjoin the mortgagor or his assigns from removing the house from the lot, except upon proof that the lot without the house will be an inadequate security for the mortgage debt.[458] After a decree foreclosing a mortgage, the mortgagor in possession, until a sale is made under the decree, is not accountable either for rents or for use and occupation, and is subject to no liability, except that he may be restrained from the commission of waste.[459] Injunction to stay waste by tenants in common lies in special cases.[460] An injunction to stay waste will not be granted where the plaintiff does not show that he is entitled to the reversion.[461] A purchaser under a judgment who has not paid the purchase money may be enjoined from waste without bringing a new action.[462] Parties holding mechanics' liens on a building erected upon a leased lot are entitled to an

454 Crescent etc. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

455 Mitchell v. Amador etc. Canal Co., 75 Cal. 464, 17 Pac. 246; Fairbank v. Cudworth, 33 Wis. 358.

456 Robinson v. Russell, 24 Cal. 473. See, also, Cal. Code Civ. Proc., § 745; Civ. Code, § 2929.

457 Hawley v. Clowes, 2 Johns. Ch. 148; Sullivan v. Rabb, 86 Ala. 433, 5 South. 746.

458 Buckout v. Swift, 27 Cal. 434, 87 Am. Dec. 90. As to injunction to restrain the moving of a house across a street, see Williams v. Railway Co., 130 Ind. 71, 29 N. E. 408, 30 Am. St. Rep. 201, 15 L. R. A. 64.

459 Whitney v. Allen, 21 Cal. 233; Robinson v. Russell, 24 Cal. 473.

460 Hawley v. Clowes, 2 Johns. Ch. 122.

461 Perrine v. Marsden, 34 Cal. 14.

462 Casamajor v. Strode, 1 Sim. & St. 381.

injunction to restrain a judgment creditor of the lessee, whose judgment is subordinate to the liens, from removing the building from the lot when it appears that the security will be rendered insufficient by such removal.[463]

§ 2928. **Against committing waste—Title disputed.**—Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon.[464]

§ 2929. **Against committing waste—Plaintiff in possession.**—An injunction lies to restrain a threatened injury to real property, in the nature of a waste, even if the plaintiff is in possession of the land.[465] But where the mischief is irreparable, or the defendant is insolvent, although the title is in dispute under summary proceedings, injunction has been granted to stay waste.[466]

§ 2930. **Against removal of building.**—An injunction will not be granted at the suit of a landlord to restrain the tenant from removing from the demised premises a building erected by him, if it appears that the security for the rent will thereby be merely impaired and lessened in value. It must appear that such security will be left inadequate to secure the rent.[467]

§ 2931. **Against removal of machinery.**—Equity has jurisdiction to interfere by injunction in favor of the owner of the reversion to stay or prevent waste threatened or being committed by tenant for life or years; and where it appears that certain machinery, belonging to plaintiff, and part of his mill property, was about to be removed by defendants, who were tenants in possession, to the great and irreparable injury of plaintiff and his property, it was sufficient to warrant an injunction, without alleging the insolvency of the defendants.[468]

463 Barber v. Reynolds, 33 Cal. 497.

464 Smith v. Wilson, 10 Cal. 528. Compare De Witt v. Van Schoyk, 110 N. Y. 7, 17 N. E. 425, 6 Am. St. Rep. 342.

465 More v. Massini, 32 Cal. 590.

466 Spear v. Cutter, 4 How. Pr. 177. See Talbot v. Hope Scott, 4 Kay & J. 126, 133.

467 Perrine v. Marsden, 34 Cal. 14.

468 Poertner v. Russel, 33 Wis. 193; Crescent etc. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426.

§ 2932. When injunction against waste lies.—Injunction to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the mean time grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief.[469]

In an action brought by the state to procure the cancellation of a patent for land sold without authority of law, where the person claiming under the patent is engaged in removing mineral from the land, the state is entitled to an injunction restraining the defendant from removing the same.[470] Cutting, destroying, and removing timber is sufficient ground for an injunction, without any allegations of insolvency.[471] And the same is true as to the destruction of fruit-trees.[472] But in a bill for partition among tenants in common, and for injunction against cutting timber-trees, it was held that defendants, being tenants in common, had the right to the enjoyment of the common estate, and to cut timber or use or dispose of it, at least to an extent corresponding to their share of the estate; and that as the complaint neither avers the insolvency of defendants nor that they are exceeding their share, injunction does not lie.[473]

§ 2933. Injunction against waste—The affidavit.—It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so; otherwise, the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined plaintiff's right.[474] But suit will lie for an injunction to stay threatened waste.[475] On a motion for an injunction to enjoin waste, the complainant cannot, on bill and answer, read affidavits in support of his title.[476] On application for an injunction to restrain waste, or mischief analogous to waste, the plaintiff may

469 Hicks v. Michael, 15 Cal. 107.
470 People v. Morrill, 26 Cal. 352.
471 Buckelew v. Estell, 5 Cal. 108; Henshaw v. Clark, 14 Cal. 460.
472 Silva v. Garcia, 65 Cal. 591, 4 Pac. 628.
473 Hihn v. Peck, 18 Cal. 640.
474 Waldron v. Marsh, 5 Cal. 119.
475 Sheridan v. McMullen, 12 Or. 150, 6 Pac. 497.
476 United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998.

read affidavits contradicting the answer upon all the matters in controversy, including questions of title.[477]

§ 2934. Against deceptive trademark.—Where a deception is practiced upon the public by one who uses or imitates the trademark of another, with a fraudulent intent, to recommend to purchasers an article similar in appearance to one already made and favorably known in the market, an injunction will be granted to restrain it.[478] A picture may be matter of trademark.[479] Where a corporation has built up a business under a descriptive popular name, another corporation engaging in the same business should be restrained from using that name; and one who acted as president of the first corporation should be enjoined from engaging in business with the newer corporation and lending his surname to its aid, when his surname had been a trade name for the old corporation. The fraud is restrained on the ground of unfair competition; but the use of the older corporation of the name of an individual who had once been connected with it is not a representation that a person of that name is now so connected.[480]

In a suit to restrain the use of "Nolan Bros." as a trade-name in a retail shoe business, the fact that defendant was successor to a wholesale firm doing a shoe business under the name of "Nolan Bros." will not entitle him to the use of such name in the retail shoe business as successor to such firm, as the latter is a distinct and different business; and plaintiff's acquiescence in defendant's use of that name for a number of years in a wholesale shoe business does not preclude him from objecting to its use as a trade-name in a retail shoe business.[481] A person coming into equity for an injunction to restrain the use of a trademark must come with clean hands and without any lack of truth in his own case, and cannot enjoin a defendant from using a trademark which he himself is not, in equity or good conscience, entitled to use, and which contains a false representation calculated to

477 Hicks v. Michael, 15 Cal. 107.

478 Coffeen v. Brunton, 4 McLean, 516, Fed. Cas. No. 2946; Solis Cigar Co. v. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. 556; Gessler v. Grieb, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20.

479 Faulkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

480 Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 Pac. 879.

481 Nolan Bros. Shoe Co. v. Nolan, 131 Cal. 271, 82 Am. St. Rep. 346, 63 Pac. 480, 53 L. R. A. 384.

deceive the public as to the manufacture of the article, and the place where it is manufactured.[482]

§ 2935. Against deceptive trademarks—When action will lie.—An injunction may be granted to restrain the use of a trademark—e. g. to restrain the publication of a paper under the same name as the paper of the plaintiff;[483] to prevent the publication of private correspondence;[484] to restrain parties from using the name chosen and used by plaintiff for his inn.[485] For fraudulent change of trademark, injunction will be granted,[486] and mere colorable differences will not in general prevent an injunction from issuing.[487] The court will consider whether the public would probably be deceived, rather than whether manufacturers could distinguish, if the article is of such a kind that the public would be apt to purchase upon the strength of the trademark.[488] Such action may be maintained without alleging or proving special damages.[489] One of two joint owners in a trademark may sue separately in respect of the injury caused by an infringement.[490]

§ 2936. Against deceptive trademarks—When action will not lie.—An injunction will not be granted to assist a wrongdoer—

482 Joseph v. Macowsky, 96 Cal. 518, 31 Pac. 914, 19 L. R. A. 53.

483 American Grocer Pub. Assoc. v. Grocer Pub. Co., 51 How. Pr. 402. See Bell v. Locke, 8 Paige Ch. 75, 34 Am. Dec. 371; also Penniman v. Briggs, Hopk. 347, 14 Am. Dec. 547.

484 In re Long Island R. R. Co., 3 Edw. Ch. (487) 515.

485 Howard v. Henriques, 3 Sandf. 725. As to infringement of trademark, see, generally, Williams v. Johnson, 2 Bosw. 1; Brooklyn etc. Co. v. Masury, 25 Barb. 417; Amoskeag Co. v. Spear, 2 Sandf. 605; Coats v. Holbrook, 2 Sandf. Ch. 586, 613; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. C. 523, 32 L. J. Ch. 199, 35 L. J. Ch. 53; Blackwell v. Crabb, 36 L. J. Ch. 504; Seixo v. Provezende, L. R., 1 Ch. App. 194; Cope v. Evans, L. R., 18 Eq. 138; Siegert v. Findlater, L. R., 7 Ch. D. 801; Ewing v. Johnston, L. R., 13 Ch. D. 434; Mitchell v. Henry, L. R., 15 Ch. D. 181; Solis Cigar Co. v. Pozo, 16 Colo. 388, 25 Am. St. Rep. 279, 26 Pac. 556; Avery v. Meikle, 81 Ky. 73; Gessler v. Grieb, 80 Wis. 21, 27 Am. St. Rep. 20, 48 N. W. 1098; Frost v. Rindskopf, 42 Fed. 408.

486 Gillott v. Kettel, 3 Duer, 626; Lemoine v. Gauton, 2 E. D. Smith, 347.

487 Williams v. Johnson, 2 Bosw. 6; Clark v. Clark, 25 Barb. 78; Brooklyn Lead Co. v. Masury, 25 Barb. 418; Amoskeag Co. v. Spear, 2 Sandf. 608.

488 Shrimpton v. Laight, 18 Beav. 164.

489 Rodgers v. Nowill, 5 C. B. 109; Blofeld v. Payne, 4 Barn. & Adol. 410; Singer Co. v. Wilson, L. R., 2 Ch. D. 434; Braham v. Beachim, L. R., 7 Ch. D. 848.

490 Dent v. Turpin, 2 Johns. & H. 139; Sheehan v. G. E. Ry. Co., L. R., 16 Ch. D. 59.

e. g. to a plaintiff who is himself counterfeiting another man's mark, so as to give him exclusive power to deceive;[491] nor in case plaintiff is in any wise imposing by fraudulent statements on the public concerning the matter.[492] And where plaintiff falsely stamped his production with the word "patented," an injunction for his protection was refused.[493] But in a case where the articles had really been patented, and the patent has expired, the plaintiff continuing the use of the old label, including the word "patented," this was held justifiable, and no ground for denying an injunction for plaintiff's benefit.[494] And the plaintiff may even use a fictitious name, and be protected in it.[495] If the facts are doubtful, or if the case is for any reason not a clear one, injunction should not be granted before a verdict upon the issues.[496] But security may be required for an accounting.[497] The registration of a trademark, under the act of Congress, on articles of a particular kind only, does not enable the person so registering it to restrain another person from using such trademark upon another kind of article of the same nature, to which the second person had been in the habit of affixing such trademark prior to the registration.[498]

§ 2937. **Trademarks—Common-law rule.**—By the common law, the manufacturer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form or device, whereby they may be known in the market as his own, and be distinguished from other like goods, manufactured or sold by other persons; and when original with him, the owner of such mark will be protected by the courts in its exclusive use, but only so far as it

491 Samuel v. Berger, 4 Abb. Pr. 88; Partridge v. Menck, 2 Sandf. Ch. 622, 1 How. App. Cas. 548; Stewart v. Smithson, 1 Hilt. 121.

492 Hobbs v. Francais, 19 How. Pr. 571, 4 Abb. Pr. 144; Perry v. Truefitt, 6 Beav. 76; Helmbold v. Helmbold Mfg. Co., 53 How. Pr. 453; Hennesy v. Wheeler, 51 How. Pr. 457. But see Fetridge v. Merchant, 4 Abb. Pr. 156; Comstock v. White, 10 Abb. Pr. 264, note, contra.

493 Flavel v. Harrison, 10 Hare, 471, 472.

494 11 Hare, 86.

495 Stewart v. Smithson, 1 Hilt. 121.

496 Wolfe v. Goulard, 18 How. Pr 69; Samuel v. Berger, 4 Abb. Pr. 88, 161; Merrimack etc. Co. v. Garner, 2 Abb. Pr. 326; Amoskeag etc. Co. v. Spear, 2 Sandf. 618; Spottiswoode v. Clarke, 2 Phillips, 156; Spottiswoode v. Clark, 2 Sandf. Ch. 628, 39 Eng. L. & Eq. 514; Farina v. Silverlock, 4 Kay & J. 650.

497 Fetridge v. Merchant, 4 Abb. Pr. 161; Spottiswoode v. Clarke, 2 Phillips, 156.

498 Smith v. Reynolds, 13 Blatchf. 458, Fed. Cas. No. 13099.

serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of any symbols, figures, and combinations of words, which may be interblended with it, indicating their name, kind, or quality.[499]

§ 2938. **Trademarks—Same name.**—Two manufacturers of the same name must use their names in such a manner as not to deceive the public. Every man has a right to the use of his own name, but he must avoid imitating the mark of another bearing the same name.[500] And the assignee of a trademark will be protected under the same rule, either against another person of the same name or against the assignor himself.[501] But the legitimate use by any man of his own name cannot be interfered with.[502]

A manufacturer will be protected in the use of his own name.[503] And so if defendant's real name be used in such a manner as is likely to mislead and deceive, an injunction will be allowed. Thus, where a hotel had been kept for many years by one Lovejoy, and, after his death, by other persons, using still the name "Lovejoy's Hotel," another Lovejoy opened a hotel under the title "Lovejoy House," he was restrained from so doing. So, where the "Irving Hotel" was opened in opposition to the "Irving House," and where the "Original What Cheer House" was opened in opposition to the "What Cheer House," injunction issued restraining the use of the titles "Irving" and "What Cheer," respectively.[504]

§ 2939. **Trademarks—Imitation of label.**—In an action to recover damages for an alleged invasion, by imitation of the plaintiff's trademark for the sale of a certain washing-powder, which consisted of a highly colored picture representing a washroom,

499 Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

500 Clark v. Clark, 25 Barb. 79; Rodgers v. Newill, 3 DeG. M. & G. 614; Croft v. Day, 7 Beav. 84; Taylor v. Taylor, 23 Eng. L. & Eq. 281; Sykes v. Sykes, 3 Barn. & Cress. 541, 5 Dowl. & Ry. 292; Fraser v. Fraser, 121 Ill. 147, 2 Am. St. Rep. 73, 13 N. E. 639; Caswell v. Hazard, 121 N. Y. 484, 18 Am. St. Rep. 833, 24 N. E. 707; Weinstock v. Marks, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142, 30 L. R. A. 182.

501 Churton v. Douglass, 1 Johns. (Eng.) 174.

502 Burgess v. Burgess, 3 De G. M. & G. 904, 17 Eng. L. & Eq. 257.

503 Howe v. Searing, 19 How. Pr. 14. But see, contra, Churton v. Douglass, 1 Johns. (Eng.) 174. Compare Priestley v. Adams, 59 Hun, 380; Jay v. Ladler, 40 Ch. Div. 649.

504 Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751.

with tubs, baskets, clothes-lines, etc., also interblended on it the legend, "Standard Soap Company, Erasive Washing-Powder," followed by directions for the use of the "washing-powder," and the place of manufacture, the alleged imitation by defendants consisted of a picture and label which were the same as in plaintiff's alleged trademark only in the use of the words "washing-powder," the direction for the use of the powders, and in use of paper of the same color as that used by plaintiff; it was held that this did not constitute an infringement of plaintiff's trademark.[505] The action may be maintained against the vendor of the simulated article, though he sells it as an imitation.[506] It is sufficient to show the fact of falsity, and that the effect will necessarily be to deceive.[507] Where a party has a right to the exclusive enjoyment of a trademark, it is not necessary for him to show, in order to make out a case for an injunction, that it has been copied in every particular by the defendant. It is enough that the representations employed bear such resemblance to his as to be calculated to mislead the public generally.[508] But the similarity must be sufficient to amount to a false representation, and calculated to deceive the public generally. When ordinary attention on the part of customers will enable them to discriminate, the courts will not interfere.[509]

§ 2940. **Trademark—Origin, not quality.**—A trademark must indicate origin, not quality. So any words of common use in connection with goods, such as "No. 1," "premium," "best," etc., cannot become exclusive property, under guise of a trademark.[510] But such common words if so put together, in form, color, and appearance, that they are likely to deceive, will be enjoined.[511]

§ 2941. **Trademarks—Protection of owners of vehicles, etc.**—The protection of a court of equity, in the matter of injunction,

505 Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76.

506 Coats v. Holbrook, 2 Sandf. Ch. 586.

507 Peterson v. Humphrey, 4 Abb. Pr. 394.

508 Walton v. Crowley, 3 Blatchf. 440, Fed. Cas. No. 17133. See Liggett etc. Tobacco Co. v. Reid Tobacco Co., 104 Mo. 53, 24 Am. St. Rep. 313, 15 S. W. 843; El Modello etc. Mfg. Co. v. Gato, 25 Fla. 886, 23 Am. St. Rep. 537, 7 South. 23, 6 L. R. A. 823.

509 Popham v. Cole, 66 N. Y. 69, 23 Am. Dec. 22.

510 Amoskeag Co. v. Spear, 2 Sandf. 606. See Stokes v. Landgraff, 17 Barb. 608; Lawrence Mfg. Co. v. Lowell Hosiery Mills, 129 Mass. 325, 37 Am. Rep. 362.

511 Williams v. Johnson, 2 Bosw. 9.

has been extended to the owners of lines of vehicles connected with a hotel;[512] and to hotel-keepers;[513] and to proprietors of places of amusement;[514] and to the proprietor of a dining-saloon whose sign was counterfeited by the owner of a neighboring saloon;[515] and to publishers whose publications have been imitated.[516]

§ 2942. **Trademarks—Prior use of words.**—Injunction will not be granted if the words used are such as have been or might reasonably have been used to designate the articles before plaintiff adopted them as his.[517]

§ 2943. **Against publication of advertisement.**—No action can be maintained to restrain the publication of advertisements of goods unless it is established that the publication is malicious and for the purpose of injuring the other party; if made to advance the publisher's own sales, and upon a reasonable claim that he has the right which he asserts, the action must fail.[518]

§ 2944. **Against violation of a trust.**—Where a specific article, or a specific sum of money, is held in trust for plaintiff by defendant, the court will enjoin the latter from disposing of or removing it, as a breach of trust, however ample the pecuniary responsibility of the defendant may be.[519] It is aptly said by the English court of chancery in an injunction case that, as it presents an element of trust, it is so peculiarly equitable in its nature that an injunction will be granted under circumstances which but for the element of trust would be entirely insufficient. So a court will not restrain the publication of a secret communicated under a contract not to reveal it, but it will certainly enjoin the same if acquired surreptitiously and in breach of confidence.[520] A *cestui*

512 Stone v. Carlan, 3 Code Rep. 68; Knott v. Morgan, 2 Keen, 213; Marsh v. Billings, 7 Cush. 322, 54 Am. Dec. 723.

513 Howard v. Henriques, 3 Sandf. 725; Woodward v. Lazar, 21 Cal. 448, 82 Am. Dec. 751.

514 Christy v. Murphy, 12 How. Pr. 77.

515 N. Y. Trans., Jan. 10, 1861.

516 Hogg v. Kirby, 8 Ves. 215; Bell v. Lock, 8 Paige, 75, 34 Am. Dec. 371; Snowden v. Noah, Hopk. 347, 14 Am. Dec. 547.

517 Wolfe v. Goulard, 18 How. Pr. 94; Burgess v. Burgess, 3 De G. M. & G. 896; Smith v. Reynolds, 13 Blatchf. 458, Fed. Cas. No. 13099.

518 Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co., 13 Blatchf. 375, Fed. Cas. No. 2543.

519 Merritt v. Thompson, 3 E. D. Smith, 296.

520 Yovatt v. Winyard, 1 Jac. & W. 394.

que trust may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property improperly.[521] An injunction may be granted to restrain two of three trustees of a private trust from making a contract to the prejudice of one of their *cestuis que trust*, and to their profit, without the assent of the third trustee, he being the representative of the *cestui que trust* who will be prejudiced by such contract.[522]

§ 2945. **Against an attorney.**—An attorney who has appeared for one party in a cause may be enjoined from appearing for the other party, and from communicating any knowledge which the confidence of his relation had given. A motion for such an injunction may be made in the course of such action, without commencing a new action against the attorney.[523]

§ 2946. **Against publication of a secret.**—The publication of a secret, though in violation of a contract, cannot be restrained,[524] unless obtained through surreptitious means, when it may be.[525] And where defendant had been in the confidential employ of plaintiff, and had taken extracts from his books and papers, and afterwards threatened to publish the same, he was not only enjoined from so doing, but also from keeping any copies of such extracts in his possession.[526]

§ 2947. **Against publications.**—Although an account of profits may be decreed to the owner of a copyright, as incidental to the relief by injunction, it must be prayed for in the bill. It cannot be decreed if the bill contains neither a prayer for an account nor for general relief.[527] The publication of legal proceedings cannot be restrained by injunction.[528] So, also, publication of a libel cannot be restrained,[529] as chancery has no jurisdiction to restrain the publication of a libel, as such, even if it is injurious

521 St. Luke's Hospital v. Barclay, 3 Blatchf. 259, Fed. Cas. No. 12241.

522 Sloo v. Law, 3 Blatchf. 459, Fed. Cas. No. 12957.

523 Cholmondeley v. Clinton, 19 Ves. 261.

524 Deming v. Chapman, 11 How. Pr. 384; Jones v. Jones, 3 Meriv. 161; Newbery v. James, 2 Meriv. 450.

525 Yovatt v. Winyard, 1 Jac. & W. 394.

526 Evitt v. Price, 1 Sim. 483.

527 Baily v. Taylor, 1 Russ. & M. 73; Colburn v. Simms, 2 Hare, 550; Stevens v. Cady, 2 Curtis, 200, Fed. Cas. No. 13395.

528 Wood v. Marvine, 3 Duer, 674.

529 Brandreth v. Lance, 8 Paige, 24.

to property.[530] Nor will the publication of a threatened libel be enjoined.[531] The publication of a manuscript or any substantial part thereof, without the author's consent, may be enjoined.[532] Thus the publication of private letters without the writer's consent may be restrained.[533]

§ 2948. **Against use of party-wall.**—Where plaintiff's wall, laid on his own land, projects over the defendant's land, the court will not compel the defendant to desist from using it as a party-wall.[534] Where there is a dispute as to whether a building rests partly on land of an adjoining owner, the owner of the building being in peaceable possession, the court may enjoin the other party from using the wall as a party-wall until he establishes his right thereto.[535]

§ 2949. **Against interference with partnership property.**—An injunction forbidding defendant to interfere with "any of the said partnership property, or from collecting the partnership debts or other moneys," but containing no reference whatever to any particular firm or copartnership business, is not sufficiently definite to put the defendant in contempt.[536] Injunction will lie to restrain one from intruding into another's store, and holding himself out as a partner of such other, collecting money due the latter, and converting it to his own use, where he is insolvent, and threatens to continue such conduct, and such claim of partnership has no foundation in fact.[537]

§ 2950. **Against boycotting.**—Boycotting, enforced by active persuasion or coercion, is illegal, and subject to injunctive prevention.[538] Where defendants, members of an association of master builders, wrote letters to architects of a building, in which

530 Prudential Assur. Co. v. Knott, L. R., 10 Ch. App. 142.

531 Clay v. Marriott, Cal. Sup. Ct., July Term, 1878. As to publication of apology alleged to have been obtained by duress, see Fisher & Co. v. Apollinaris Co., L. R., 10 Ch. App. 297.

532 Bartlett v. Crittenden, 5 McLean, 32, Fed. Cas. No. 1076.

533 Id.; Woolsey v. Judd, 4 Duer, 385, 11 How. Pr. 49.

534 Guttenberger v. Woods, 51 Cal. 523.

535 Mathis v. Strunk, 73 Kan. 595, 85 Pac. 590.

536 Moat v. Holbein, 2 Edw. Ch. 188; Miles v. Thomas, 9 Sim. 609; Peterson v. Humphrey, 4 Abb. Pr. 394.

537 DeGroot v. Peters, 124 Cal. 406, 71 Am. St. Rep. 91, 57 Pac. 209.

538 Jensen v. Cooks' etc. Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302.

they declined to bid on the building if plaintiff's bid should be received in competition, an injunction would not issue against defendants to restrain them from interference with plaintiff's business, as there was no coercion or intimidation suggested in the letters, and the architects were at liberty to receive bids of numerous builders who had not signed the letters.[539]

§ 2951. **Against a vendor.**—An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title, so long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession.[540] A bill in chancery filed by the purchaser of land against his vendor to restrain the collection of purchase money, upon the grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.[541] Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.[542]

§ 2952. **Against vendor's lien.**—A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtaining judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee. It was held that this judgment of the court below was correct, and that the claim of the purchaser, to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate action.[543]

539 Master Builders' Assoc. v. Domascio, 16 Colo. App. 25, 63 Pac. 782.

540 Jackson v. Norton, 6 Cal. 187.

541 Patton v. Taylor, 7 How. 132, 12 L. Ed. 637.

542 Allen v. Phelps, 4 Cal. 256.

543 Id.

§ 2953. Against transfer of negotiable note.—If an action for an equitable set-off is maintained, an injunction lies to prevent one party who holds a negotiable note from disposing of it.[544]

§ 2954. Against executors and administrators.—An injunction may be granted, at the instance of parties claiming to be preferred creditors of an estate, to prevent an executor or administrator from making distribution of assets, or removing them beyond the jurisdiction of the court.[545]

§ 2955. Against municipal corporations — Water plants.—A city without the power to take possession of a waterworks plant rightfully may be enjoined from doing it forcibly.[546] Bondholders of a water company cannot enjoin a city treasurer from paying warrants issued to the company for hydrant rentals on the ground that the city had, by ordinance, agreed to pay such rentals to the bondholders, and had set apart a special fund for that purpose, when it is not alleged that the bondholders purchased in reliance on such agreement, or knew of the special fund, or that any demand had been made on the city and refused, or that the city is insolvent. Plaintiffs are general creditors only.[547]

§ 2956. Against municipal corporations—Public places and property.—Where the complainant had erected electric-light poles in the streets of a city under a franchise, it was not entitled to restrain the city from compelling the removal of the poles to other locations, and mere lapse of time does not create a prescriptive right in a gas and electric company to maintain its poles in the city streets in their original location.[548] An owner of an opera-house is not entitled to maintain an injunction suit against the city to keep it from allowing entertainments for private profit in the city's auditorium, though wrongful, and interfering with his profits.[549]

544 Schieffelin v. Hawkins, 1 Daly, 289; Osborne v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204. As to transfer of bonds, etc., see State of Illinois v. Delafield, 8 Paige, 527, 2 Hill, 177; approved in Farmers' Bank v. Butchers' etc. Bank, 16 N. Y. 137, 69 Am. Dec. 678; Ingram v. Smith, 83 Cal. 234, 23 Pac. 298.

545 Green v. Hanberry, 2 Brock. (Marsh.) 403, Fed. Cas. No. 5759. Compare Wilson v. Barstable, 1 Cranch C. C. 394, Fed. Cas. No. 17789.

546 City of Los Angeles v. Los Angeles City Water Co., 124 Cal. 368, 57 Pac. 210.

547 Courtney v. City of Cherryvale, 7 Kan. App. 391, 51 Pac. 930.

548 Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720, 84 Pac. 239.

549 Amusement Syndicate Co. v. City of Topeka, 68 Kan. 801, 74 Pac. 606.

§ 2957. Against municipal corporations — Construction of sewer.—An allegation in a complaint to enjoin the construction of a sewer by a city, which states that "the plaintiff further alleges that said sewer can be constructed in the center of said street, if necessary, without injuring the plaintiff's property, and without interfering with the operation of the plaintiff's said street railway," does not negative the presumption that the city was proceeding in such a manner as not unreasonably to interfere with the rights of the plaintiff, and is demurrable for want of sufficient facts.[550]

§ 2958. Against municipal corporations — Construction of streets.—Complainants in an action to restrain a city from grading a street in front of their places, having been granted a jury trial, it was not error to permit the jury to assess all damages for the taking and damaging of their property, instead of in a proceeding to be instituted therefor, under the code.[551] Also, the mortality tables showing the expectancy of life are not admissible in such an action to make an estimate of the amount of damages.[552] The owner of a lot may be estopped and not be entitled to an injunction against the sale of such lot for the amount due on a bond for street improvements, on account of laches or the acts of a predecessor in title.[553] Under section 9 of the street improvement act, a complaint filed April 13, 1900, to foreclose a street-assessment lien, alleging the recording of the warrant therefor on March 17, 1898, is demurrable.[554]

A complaint in an action to restrain the collection of an assessment, alleging that a city council adopted the frontage rule in levying an assessment, is insufficient, where it does not state that the benefit is not proportional to the tax.[555]

§ 2959. Against municipal corporations—Irregular assessments.—The fact that the assessment for state and county taxes for 1855-1856 in San Francisco county was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not a sufficient ground for an in-

550 Spokane Street Ry. Co. v. Spokane, 5 Wash. 634, 32 Pac. 456.

551 Swope v. City of Seattle, 36 Wash. 113, 78 Pac. 607.

552 Id.

553 Cummings v. Kearney, 141 Cal. 156, 74 Pac. 759.

554 Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.

555 Beck v. Holland, 29 Mont. 234, 74 Pac. 410.

junction upon the collection of taxes, as the party could have appealed to the board of equalization if aggrieved.[556] Where an assessment and sale for taxes would be void, and the matters making them void do not appear on the face of the tax-collector's deed, but must be shown by extrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale.[557] An individual whose property is assessed without authority from a municipal corporation, for a local improvement, may maintain an action to enjoin its collection, not only on the ground of avoiding a multiplicity of suits, but also to remove the cloud on the title;[558] and the objection that all persons united in interest are not joined as plaintiffs is waived, if not set up by the pleadings.[559]

Injunction will lie to restrain the collection of an assessment for a municipal improvement made in contravention of the California session laws of 1897.[560] Complainants held not entitled to enjoin the vacation of a street, though a cul-de-sac was formed by such vacation.[561] Owners of land assessed for a local improvement may join in a suit to restrain the city from collecting an assessment for such local improvement in excess of what is admitted to be due, and the entry of an unconditional judgment for plaintiffs may not be error.[562] The fact that city officials, purporting to grade a street, encroach on abutting property does not entitle the abutter to enjoin the collection of an assessment regularly levied against his property for the grading.[563]

§ 2960. **Against municipal corporations — Taxes and assessments—Continued.**—In an action to enjoin a city from issuing bonds to construct waterworks, where the petition alleges that there were nine illegal votes cast, the burden is on the plaintiff to establish such allegation; and where no such attempt is shown,

556 Merrill v. Gorham, 6 Cal. 41.

557 Burr v. Hunt, 18 Cal. 303.

558 Heywood v. City of Buffalo, 14 N. Y. 534. See, also, Farrington v. Investment Co., 1 N. Dak. 102, 45 N. W. 191; Valle v. Ziegler, 84 Mo. 214; Dalton v. East Portland, 11 Or. 426, 5 Pac. 193; Allen v. Railroad Co., 114 U. S. 311, 29 L. Ed. 200, 5 Sup. Ct. 925.

559 Ireland v. City of Rochester, 51 Barb. 414.

560 Sess. Laws 1897, p. 219, § 31. See Hensley v. City of Butte, 33 Mont. 206, 83 Pac. 481.

561 Ponischil v. Hoquiam Sash etc. Co., 41 Wash. 303, 83 Pac. 316.

562 Coleman v. Rathbun, 40 Wash. 303, 82 Pac. 540.

563 Davis v. City of Silverton, 47 Or. 171, 82 Pac. 16.

the question is waived.[564] Under a statute authorizing injunction to restrain the illegal collection of taxes, the collection of taxes cannot be enjoined merely for failure to attach the oath required by statute to the assessment.[565] But the collection may be enjoined on the ground that plaintiff has no taxable property in the county, without first making application to the board of equalization to correct the assessment.[566]

In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and in such case to grant an injunction is error.[567] *Quære,* whether a taxpayer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation.[568] The collection of taxes due on property cannot be restrained unless it be shown that the injury resulting from the collection to the owner would be irreparable. An averment of this character must appear in the bill, and, if denied, it must be sustained on the hearing.[569]

The collection of taxes, even though illegal, if attempted to be collected by legal officers, cannot be restrained by injunction;[570] and the same is held in the case of an assessment by local authorities.[571] Nor is interference proper on the ground that the officials who imposed the assessment were legally disqualified from holding office.[572] But the United States supreme court has enjoined the collection of an unconstitutional tax.[573] A court will not restrain a sale for taxes when it is apparent on the face of the proceedings upon which the purchaser must rely to make out a *prima facie* case to enable him to recover under the sale that such sale would be void.[574]

564 Territory v. Whitehall, 13 Okla. 534, 76 Pac. 148.

565 Horton v. Driskell, 13 Wyo 66, 77 Pac. 354.

566 Id.

567 Minturn v. Hayes, 2 Cal. 590, 56 Am. Dec. 366.

568 Pattison v. Board of Supervisors, 13 Cal. 175.

569 Ritter v. Patch, 12 Cal. 298. See, also, Shelton v. Platt, 139 U. S. 591, 35 L. Ed. 273, 11 Sup. Ct. 646; Dean v. Davis, 51 Cal. 407.

570 Wilson v. Mayor of New York, 1 Abb. Pr. 4; Chemical Bank v. Mayor of New York, 1 Abb. Pr. 79. See Wells Fargo & Co. v. Dayton, 11 Nev. 161; Nunda v. Crystal Lake, 79 Ill. 311; State R. R. Tax Cases, 92 U. S. 575, 23 L. Ed. 663.

571 Heywood v. City of Buffalo, 14 N. Y. 534; Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204.

572 Thatcher v. Dusenbury, 9 How. Pr. 32.

573 Dodge v. Woolsey, 18 How. 340, 15 L. Ed. 401.

574 Bucknall v. Story, 36 Cal. 67.

A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax-deed is made *prima facie* evidence of title;[575] or the sale of real property under an illegal assessment.[576] Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. It seems that if the injunction bill had been filed before the work was commenced, the court would have felt bound to inquire into the regularity of the assessment.[577]

In a suit to enjoin the collection of taxes on national bank stock, on the ground that the assessment was so excessive, as compared with that assessed on other moneyed capital, as to amount to an illegal discrimination, the evidence did not show a discrimination.[578] The courts of Washington have jurisdiction to enjoin the collection of a personal property tax, where it is due, and a levy on the part of the collecting officer is threatened; and a failure of the executors suing to enjoin levy on omitted personalty of testatrix, to bring money into court for taxes admitted to be due, does not require a dismissal of the action.[579] Also, on reversing a decree which restrains the collection of such a tax, the supreme court does not continue the injunction.[580]

Injunction does not lie to restrain the collection of a tax because of any error of the board of equalization which had jurisdiction to assess the tax.[581] In an action to enjoin the sale of property for taxes, an allegation that other property of similar character and value in the vicinity has been assessed at a less value than complainant's is insufficient to warrant relief in equity.[582] The complaint to enjoin the tax-collector from selling property for taxes must allege the full cash value of the property, if injunction is prayed for on the grounds of an excessive levy, and demurrer will

575 Palmer v. Boling, 8 Cal. 388; Fremont v. Boling, 11 Cal. 387. See Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Robinson v. Gaar, 6 Cal. 275.

576 Heywood v. City of Buffalo, 14 N. Y. 545; Van Doren v. Mayor of New York, 9 Paige Ch. 390.

577 Weber v. City of San Francisco, 1 Cal. 455.

578 Ankeny v. Blakley, 44 Or. 78, 74 Pac. 485.

579 Phillips v. Thurston County, 35 Wash. 187, 76 Pac. 993.

580 Cochise County v. Copper Queen Cons. Min. Co., 8 Ariz. 459, 76 Pac 595.

581 Crewdson v. Nefsy, 14 Wyo. 61, 82 Pac. 1.

582 Humbird Lumber Co. v. Thompson, 11 Idaho, 614, 83 Pac. 941.

lie to the complaint, if the requirements of the statute have not been complied with.[583]

An injunction to restrain an assessor and collector of a county from making any new and additional assessment of the capital stock and property of a bank is not properly issued until the assessment is made and a tax levied.[584] A landowner is not entitled to an injunction against collection of taxes for misdescription of real estate in the assessment thereof, nor for alleged errors not brought before the board of equalization.[585] One who is assessed for both real and personal property cannot enjoin the sale of the realty for taxes by tendering the amount due on the real estate alone.[586] A suit by citizens and taxpayers to restrain the sale of land for taxes assessed against it is a proper remedy to determine in which of two counties plaintiff's land is subject to assessment.[587] In an action to restrain the collection of taxes, minutes of the board of equalization may be used to show that an increase in an assessment was made without the ten days' notice to the taxpayer required by law; and a decree enjoining such collection, without requiring, as a condition precedent, the payment of the tax admitted to be due, is erroneous.[588]

§ 2961. **Against tax sale.**—A court will not restrain a sale for taxes when it is apparent upon the face of the proceedings, upon which the purchaser must rely to make out a *prima facie* case, to enable him to recover under the sale, that the sale would be void.[589] Before equity will interfere by injunction, it must appear that, after a sale, a deed is about to be executed which will cast a cloud on the title.[590] Or it must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury.[591] So, where an injunction is sought to restrain a sale under execution, the facts must clearly appear, and insolvency of defendant must be alleged.[592]

583 Humbird Lumber Co. v. Thompson, 11 Idaho, 614, 83 Pac. 941.

584 First Nat. Bank v. Albright, 13 N. Mex. 514, 86 Pac. 548.

585 Ricketts v. Crewdson, 13 Wyo. 284, 79 Pac. 1042, 81 Pac. 1.

586 Id.

587 Allison v. Hatton, 46 Or. 370, 80 Pac. 101.

588 Montana Ore-Purchasing Co. v. Maher, 32 Mont. 480, 81 Pac. 13.

589 Bucknall v. Story, 36 Cal. 67.

590 Houghton v. Austin, 47 Cal. 646; Minturn v. Smith, 3 Saw. 142, Fed. Cas. No. 9647.

591 Dows v. City of Chicago, 11 Wall. (U. S.) 108, 20 L. Ed. 65.

592 More v. Ord, 15 Cal. 204.

§ 2962. **Restraining collection of tax.**—A complaint seeking to enjoin the collection of a tax, on the ground of irregularity or illegality in the assessment, which fails to show that the complainant had first sought relief before the board of equalization, will be held bad on demurrer.[593]

§ 2963. **Restraining collection of tolls.**—In an action to restrain the collection of tolls on a wagon-road, an allegation in the complaint that the road is a public highway will be considered, in the absence of a special demurrer, as an averment of an ultimate fact, and it is sufficient to sustain a judgment for the plaintiff, if the fact be found in the same language.[594]

§ 2964. **What public officers cannot be enjoined.**—The government cannot be enjoined.[595] Nor can the President be enjoined;[596] nor heads of United States departments.[597] In cases where the process of injunction cannot reach the principal who is the true source of the mischief, and in the case of a sovereign state exempt from all judicial process, an injunction may be awarded to restrain the agent who is to be made the instrument of the wrong. The privilege of the principal is not communicated to the agent.[598]

§ 2965. **Against public officers.**—Any person or corporation, a taxpayer, may sue any officer or agent of the political division in which he is a taxpayer to restrain illegal expenditure of, waste of, or injury to the estate or funds of such political division of the state.[599] An injunction may be issued to restrain public officers from proceedings taken under an unconstitutional statute, which involves the imprisonment of the plaintiff,[600] or if such proceedings would work irreparable damage and mischief to the

593 First Nat. Bank v. Bailey, 15 Mont. 301, 39 Pac. 83. See, also, Farrington v. Investment Co., 1 N. Dak. 102, 45 N. W. 191; Wagoner v. Loomis, 37 Ohio St. 571; Breeze v. Haley, 11 Colo. 351, 18 Pac. 551; Winn v. Shaw, 87 Cal. 631, 25 Pac. 968; Laughlin v. Santa Fe County, 3 N. Mex. 264 (420), 5 Pac. 817; Shalton v. Platt, 139 U. S. 591, 35 L. Ed. 273, 11 Sup. Ct. 646.

594 People v. Anderson etc. Road Co., 76 Cal. 190, 18 Pac. 308.

595 Hill v. United States, 9 How. 386, 13 L. Ed. 185; United States v. McLemore, 4 How. 286, 11 L. Ed. 977.

596 Mississippi v. Johnson, 4 Wall. 475, 18 L. Ed. 437.

597 Walker v. Smith, 21 How. 579, 16 L. Ed. 223.

598 Osborn v. Bank of United States, 9 Wheat. 738, 6 L. Ed. 204.

599 Cal. Code Civ. Proc., § 526a; Stats. 1909, p. 578.

600 Holt v. Commissioners of Excise, 31 How. Pr. 334, note.

plaintiff's property rights.[601] That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the state interest within the water-line is invalid.[602] An injunction restraining the city officers from making payment of sums for which the city is liable cannot be sustained.[603] Nor will the court restrain public officers from issuing bonds authorized by law, upon apprehension that the public officer will misapply their avails.[604]

§ 2966. **Against board of supervisors.**—An injunction will not be granted to restrain a board of supervisors from incurring liabilities which are not a legal charge against a county.[605] Injunction will not lie at the suit of a claimant to restrain the board of supervisors from seating a rival claimant, or to restrain him from acting, or to require the board to allow plaintiff to act until his title to the office is determined.[606] A board of supervisors may be enjoined from letting a contract in direct contravention of the charter of the city of San Francisco.[607] Where a contract is *ultra vires* a permanent injunction may be properly granted to enjoin the payment of the contract price.[608]

§ 2967. **Against school officers.**—A court may enjoin public officers from spending money in an unauthorized place and for unauthorized purposes.[609] Where a county superintendent attempts to detach a part of a territory from an organized school district unlawfully, injunction is the proper remedy.[610] One who has contracted with the state board of education as to school-books is not entitled to an injunction against the action of a county board in changing books.[611] The acts of a conference provided to adopt school-books are not of a judicial character, so as to preclude an injunction against the execution of their determination.[612]

601 Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363, 11 Sup. Ct. 699.

602 Guy v. Hermance, 5 Cal. 73, 63 Am. Dec. 85; Stone v. Elkins, 24 Cal. 127.

603 Hecker v. Mayor of New York, 18 Abb. Pr. 369, 28 How. Pr. 211.

604 Faulkner v. Metcalf, 43 Barb. 255.

605 Linden v. Case, 46 Cal. 171; Cal. Civ. Code, § 3423.

606 People v. District Court, 29 Colo. 277, 93 Am. St. Rep. 61, 68 Pac. 224.

607 Barto v. Board of Supervisors, 135 Cal. 494, 67 Pac. 758.

608 Brown v. State, 73 Kan. 69, 84 Pac. 549.

609 Board of Education v. Territory, 12 Okla. 286, 70 Pac. 792.

610 School District v. Turner, 13 Okla. 71, 73 Pac. 952.

611 Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77.

612 Tanner v. Nelson, 25 Utah, 226, 70 Pac. 984.

§ 2968. **Against city officials.**—Police officers are entitled to patrol a common entrance to a court occupied by a restaurant and houses of ill-fame.[613] And public officers cannot be restrained from sending plain-clothes-men into plaintiff's place of business to detect alleged violations of city ordinances;[614] nor may the police be restrained from interfering with the giving of a sparring exhibition.[615]

Injunction will not lie to test the validity of an act of the city council in removing a city attorney from office.[616] In a suit to enjoin the enforcement of a municipal ordinance regarding additions to the city, it cannot be assumed that the discretionary power of the council will be abused.[617]

A court has no jurisdiction to enjoin the passage and approval of an ordinance on the ground that it would be for the best interest of the public;[618] and the passage of an ordinance fixing the assessment for local improvements will not be enjoined, though it may be void.[619] Injunction against the leasing of a part of a public park for hotel purposes for twenty-five years will not lie under section 718 of the Civil Code of California, forbidding the leasing of municipal property for longer time than ten years.[620]

§ 2969. **Against school districts.**—Since the trustees of a free county high school are not a part of the taxing power, injunction will not lie at the suit of a taxpayer to restrain the trustees under a void election from presenting to county commissioners an estimated tax-rate.[621] In Oklahoma, the dividing of school-children into two classes, white and colored, and requiring the creation of a county fund for the benefit of the minor class, is mandatory, and injunction will issue to prevent the disposal of a schoolhouse by the district.[622] A complainant is entitled to a mandatory injunction compelling school-directors to use his history during some part of the school-year, as prescribed by the state board of

613 Pon v. Wittman, 147 Cal. 280, 81 Pac. 984, 2 L. R. A. (N. S.) 683.

614 Adams v. Chesapeake Oyster etc. Co., 34 Colo. 219, 82 Pac. 528.

615 Olympic Athletic Club v. Speer, 29 Colo. 158, 67 Pac. 161.

616 Howe v. Dunlap, 12 Okla. 467, 72 Pac. 365-895.

617 Hillman v. City of Seattle, 33 Wash. 14, 73 Pac. 791.

618 Wright v. People, 31 Colo. 461, 73 Pac. 869.

619 Kadderly v. City of Portland, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

620 Harter v. City of San Jose, 141 Cal. 659, 75 Pac. 344.

621 Morse v. Jacky, 34 Mont. 165, 85 Pac. 882.

622 Board of Education v. Board of Commissioners, 14 Okla. 322, 78 Pac. 455.

educators, and the board of directors are not entitled to defend a suit to restrain them from failing to comply with a contract executed by the state board of education.[623] And in such a case the fact that the contractor's bond is insufficient, or that complainant's geography had been changed since the contract was made, is not a sufficient defense.[624] But proof of nominal damages is insufficient to sustain an injunction restraining school directors from using a copy-book in connection with complainant's tablet, contracted for by the state board of education.[625] Injunction at the suit of a taxpayer is a proper remedy to restrain a school-district from constructing schoolhouses at unauthorized places, or to restrain the payment of an illegal warrant of a school-district, without making the holder of the warrant a party.[626]

§ 2970. Against taking office.—An injunction does not issue to restrain a party from taking possession of an office, and its books and papers, under color of title thereto.[627] Nor will injunction issue at the instance of one who claims an office under an election by the people to restrain the payment of the salary to the incumbent, pending the trial of a contest of the right to the office, unless the bill shows that an action at law for the salary received by the incumbent would be abortive.[628] Injunction against public officers by their individual names would not bind their successors or the public.[629] The official discretion of an officer cannot be controlled by injunction.[630]

§ 2971. Against abuse of process.—The United States circuit court has jurisdiction in equity, on bill or petition filed and proper case made, to restrain the use of its process by the marshal in a manner contrary to law.[631]

623 Eaton etc. Co. v. Royal, 36 Wash. 435, 78 Pac. 1093; Wagner v. Royal, 36 Wash. 428, 78 Pac. 1094.

624 Id.

625 Westland Pub. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096.

626 Kellog v. School District, 13 Okla. 285, 74 Pac. 110.

627 Coulter v. Murray, 15 Abb. Pr. (N. S.) 129. See Huels v. Hahn, 75 Wis. 468, 44 N. W. 507; Kilpatrick v. Smith, 77 Va. 347.

628 Colton v. Price, 50 Ala. 424.

629 Magee v. Cutler, 43 Barb. 239. As to injunction against officers generally, restraining them from acting, see Hartwell v. Armstrong, 19 Barb. 175; Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. Ed. 363, 11 Sup. Ct. 699.

630 McWhorter v. Railroad Co., 24 Fla. 417, 5 South. 129, 12 Am. St. Rep. 220, 2 L. R. A. 504; Cal. Code Civ. Proc., § 531.

631 Gibbs v. Usher, 1 Holmes, 348, Fed. Cas. No. 5387.

§ 2972. **Insufficient grounds for injunction.**—In a bill for an injunction to restrain defendants from taking possession of certain real estate,—a warehouse and wharf,—the complainant averred plaintiffs' title to the property, and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connection with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property destroyed. It was held that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of the defendants, and the complaint not showing that there is no adequate remedy at law.[632] The answer in chancery of a corporate body under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it, if granted.[633] A mere denial in the answer of the equity of the bill will not prevent the court from looking into the law and the facts of the case on a motion for a special injunction, and granting or refusing it, according to its discretion.[634]

§ 2973. **Order to show cause.**—The object of the practice of issuing an order to show cause before granting the injunction is to enable the parties to present the case on the merits. Where an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expires by limitation.[635] In an action for an injunction the force of a restraining order previously issued ceases upon the granting of an injunction *pendente lite*.[636]

In a California case, it was held that the temporary injunction granted on filing the complaint should not have been dissolved

632 Tomlinson v. Rubio, 16 Cal. 202.

633 Haight v. Proprietors Morris Aqueduct, 4 Wash. C. C. 601, Fed. Cas. No. 5902.

634 Clum v. Brewer, 2 Curtis C. C. 506, Fed. Cas. No. 2909.

635 Hicks v. Michael, 15 Cal. 107.

636 Cohen v. Gray, 70 Cal. 85, 11 Pac. 508. See Sheward v. Citizens Water Co., 90 Cal. 635, 27 Pac. 439; Walker v. Emerson, 89 Cal. 456, 26 Pac. 968.

before the hearing; that on the facts stated in the complaint, an action for damages would be fruitless; that although the complaint does not aver absolute insolvency of the defendants, still enough is averred to satisfy the court that a judgment for damages would be worthless, and hence the injunction ought to have been continued.[637] On a hearing to show cause why defendants should not be enjoined *pendente lite* from working a certain vein of ore, there was substantial evidence to show that the vein belonged to plaintiff, though there was conflicting evidence, but it was not an abuse of discretion to grant the injunction.[638] It is not the proper function of a preliminary injunction to change the possession of property.[639]

The granting of an injunction order without notice, in a divorce action, restraining defendant from interfering with plaintiff during the pendency thereof, and from disposing of his property, was illegal, where the application failed to show emergency, or to set forth any reason why the order should issue without notice.[640]

§ 2974. When order to show cause will issue.—If the court or judge deem it proper that the person sought to be enjoined should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the mean time be restrained.[641] Where a temporary restraining order, pending the hearing of an order to show cause why an injunction should not issue, was against a mining company, and suspended the operation of valuable property, it was an abuse of discretion to stay the hearing on the order to show cause six weeks from the issuance of the temporary restraining order, as it was unreasonable to suspend the operation of the mine for so long a period.[642]

An injunction *pendente lite* to restrain majority stockholders of a corporation from ratifying an illegal transfer of the corporation property, made by the officers and directors, will not be refused because the corporation offers a bond, since a stockholder is en-

637 Hicks v. Compton, 18 Cal. 206.

638 Parrot Silver etc. Min. Co. v. Heinze, 24 Mont. 485, 62 Pac. 818.

639 San Antonio Water Co. v. Bodenhamer etc. Co., 133 Cal. 248, 65 Pac. 471.

640 In re Groen, 22 Wash. 53, 60 Pac. 123.

641 Cal. Code Civ. Proc., § 530.

642 Wetzstein v. Boston etc. Min. Co., 25 Mont. 135, 63 Pac. 1043.

titled to restrain the illegal transfer of the corporate assets as of right.[643]

§ 2975. **Form of order.**—No particular form of order to restrain is necessary. The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then, at their peril, obey.[644] The language should be so clear and explicit that an unlearned man can understand it, without employing counsel to advise him what he has a right to do;[645] and should contain sufficient to apprise the party as to what he is restrained from doing,—though how far actual knowledge of its purpose on the part of the defendant may affect this, *quære*.[646]

§ 2976. **To whom directed.**—Though an injunction should not in general be directed to persons not parties to the action,[647] yet the defendant cannot object to it on this ground.[648] But it is usual and proper to express that the agents, attorneys, and servants of the defendant are enjoined; whether they are named or not, they are bound by it, if they have notice of it.[649] In New York, it seems that the court will not enforce obedience of such an injunction on an *ex parte* application for an attachment;[650] and an injunction against persons not parties is operative only as a notice to such.[651]

§ 2977. **Appeal from order.**—An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal.[652] An injunction is not dissolved or superseded by appeal taken.[653] So a pendency of motion for

643 Forrester v. Butte etc. Min. Co., 21 Mont. 544, 55 Pac. 229, 353.

644 Summers v. Farish, 10 Cal. 347.

645 Laurie v. Laurie, 9 Paige, 234; Clark v. Clark, 25 Barb. 76.

646 Sullivan v. Judah, 4 Paige, 444; Byam v. Stevens, 4 Edw. Ch. 119.

647 Iveson v. Harris, 7 Ves. 257; Bloomfield v. Snowden, 2 Paige, 355; Edmonston v. McLoud, 19 Barb. 361.

648 Tradesman's Bank v. Merritt, 1 Paige, 304.

649 Mayor of New York v. Conover, 5 Abb. Pr. 252; Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489; Golden Gate etc. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

650 Watson v. Fuller, 9 How. Pr. 426.

651 Sage v. Quay, Clarke (N. Y.), 348; Edmonston v. McLoud, 19 Barb. 361.

652 Hicks v. Michael, 15 Cal. 107.

653 Merced Min. Co. v. Fremont, 7 Cal. 130.

new trial does not operate as a suspension of an injunction.[654] Where defendants have appealed from an order granting temporary injunction against them, and then made motion to dismiss their appeal, served the same on plaintiff, and had it accepted, the trial court has jurisdiction to grant another injunction in favor of defendants after the notice of such dismissal.[655]

The continuance of a preliminary injunction to abate a nuisance is largely a matter of discretion of the court, and its action will not be disturbed on appeal unless abuse of discretion appears.[656] And where an injunction *pendente lite* has been granted, it devolves upon the party complaining to show that its issuance was an abuse of discretion.[657] Where the evidence of title is conflicting, the issue of an injunction *pendente lite* should not be disturbed.[658]

In a suit to restrain an irrigation company from shutting off water, the decree provided that defendant be perpetually enjoined from shutting off the water, but that he might, on certain conditions, move to have the injunction set aside. Pending a motion to vacate the injunction, plaintiff appealed, whereupon the court denied the motion. The injunction went into effect on the rendition of the judgment; and as it could not be dissolved except by a motion which would be a proceeding on the judgment, it was within section 946 of the Code of Civil Procedure, providing that an appeal stays further proceedings on the judgment from which it is taken.[659] An appeal from a decree in a proceeding for an injunction by a publisher to enjoin the use of books published by a rival concern, and to compel the use of his books, stays the decree so that the board are not in contempt in refusing, during the appeal, to desist from using the books of the intervener, and a writ of prohibition will issue to prevent their punishment.[660]

§ 2978. When injunction may be granted.—Granting or continuing injunctions rests very much in the sound discretion of the

654 Ortman v. Dixon, 9 Cal. 23.

655 DeMers v. Sandy Spit Fish Co., 24 Wash. 582, 64 Pac. 799.

656 Marks v. Weinstock, Lubin & Co., 121 Cal. 53, 53 Pac. 362.

657 Heinze v. Boston etc. Min. Co., 20 Mont. 528, 52 Pac. 273.

658 Parrot Silver etc. Min. Co. v. Heinze, 25 Mont. 139, 87 Am. St. Rep. 386, 64 Pac. 326, 53 L. R. A. 491; Butte etc. Cons. Min. Co. v. Montana Ore-Purchasing Co. (Mont.), 55 Pac. 112.

659 Rogers v. Superior Court, 126 Cal. 183, 58 Pac. 452.

660 Marks v. Superior Court, 129 Cal. 1, 61 Pac. 436.

court, to be governed by the nature of the case; and this discretion should always be exercised in favor of the party most liable to be injured.[661] And unless it appears that its discretion has been abused, the action of the trial court will not be disturbed on appeal.[662] The abuse of discretion in granting the writ of injunction should be guarded against.[663] An order or writ may be granted by the court in which the action is brought, or by a judge thereof, and, when made by a judge, may be enforced as the order of the court.[664]

§ 2979. **Service of injunction.**—A copy of the complaint, and verification attached, or affidavits, if not previously served, must be served with the injunction.[665] The statute of California points out no mode for service of an injunction; but it has been held in a recent case that the writ may be served by any person authorized to serve a summons. But in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless especially requested by the party served, no opinion is here expressed.[666] When granted upon affidavit, a copy of the affidavit must be served with the injunction.[667]

A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired.[668] A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him; giving him verbal notice that an order enjoining him has been made is not sufficient. It seems that if a party be in court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby.[669] An injunction order, and due service thereof on the party enjoined, do not operate to enlarge the time within which an act is required to be done by

661 Hicks v. Michael, 15 Cal. 107; Hicks v. Compton, 18 Cal. 206.

662 Grannis v. Lorden, 103 Cal. 472, 37 Pac. 375; White v. Nunan, 60 Cal. 406.

663 DeWitt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

664 Cal. Code Civ. Proc., § 525; N. Y. Code Civ. Proc., § 606.

665 Cal. Code Civ. Proc., § 527.

666 Edmondson v. Mason, 16 Cal. 386.

667 Cal. Code Civ. Proc., § 527.

668 Whitney v. Butterfield, 13 Cal. 335, 73 Am. Dec. 584.

669 Elliott v. Osborne, 1 Cal. 396.

the party procuring the order.[670] Where the plaintiff in an injunction suit endeavored to entrap the defendant into a violation of the injunction, it was held that the plaintiff should be charged with the costs of an application for an attachment made by him.[671] An attachment for disobeying an injunction may be granted;[672] and the court may imprison for a contempt in violation of an injunction.[673]

§ 2980. **Demurrer.**—Where a bill for injunction is insufficient because it alleges facts on information and belief, yet is made the basis of a preliminary injunction, it is not demurrable, since the demurrer admits the facts alleged upon information and belief; and the bill should not be dismissed.[674] There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction when the averment of his right in the complaint is admitted by demurrer.[675]

§ 2981. **Amended pleadings.**—It is not an abuse of discretion for the court to refuse to permit an amended complaint, which does not show that plaintiff may be irreparably injured, and does not state a cause of action for injunction, to be filed.[676] A restraining order should not be granted on a complaint by a corporation verified only on information and belief.[677]

§ 2982. **Answer.**—Upon a motion to dissolve an injunction, an averment in an answer not responsive to any allegation in the bill is not *per se* evidence against the complaint. The answer of the defendant, in order to be evidence in his favor, must respond to a fact averred in the bill, and not to a mere inference of law.[678] If the answer denies the equities, it will be dissolved, but without prejudice.[679] But it does not follow, necessarily, that the injunc-

670 Elliott v. Osborne, 1 Cal. 396.

671 Sparkman v. Higgins, 2 Blatchf. 29, Fed. Cas. No. 13209.

672 Monroe v. Harkness, 1 Cranch C. C. 157, Fed. Cas. No. 9713.

673 Monroe v. Bradley, 1 Cranch C. C. 158, Fed. Cas. No. 9713. See Cal. Code Civ. Proc., §§ 1212, 1218, 1219.

674 Tibbits v. Miller, 9 Okla. 677, 60 Pac. 95.

675 Tuolumne Water Co. v. Chapman, 8 Cal. 392.

676 Haupt v. Independent Tel. etc. Co., 25 Mont. 122, 63 Pac. 1033.

677 Butte etc. Cons. Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 125, 60 Pac. 1039.

678 Merritt v. Brinkerhoff, 17 Johns. 306, 8 Am. Dec. 404; Payne v. Coles, 1 Munf. (Va.) 373; Page's Exr. v. Winston's Admr., 2 Munf. (Va.) 298; United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998.

679 Hazard v. Hudson River Bridge Co., 27 How. Pr. 296.

tion should be dissolved in such case.[680] And the supreme court will not interfere, except in case of abuse of discretion.[681]

Where an answer did not deny ownership and possession in the plaintiff, but did deny trespass, except as in a counterclaim set forth, the plaintiff, on the pleadings, was entitled to recover damages, unless the facts set forth in the counterclaim justified the trespass.[682]

§ 2983. Trial of issues.—Where a perpetual injunction is prayed for, and also damages, the complaint stating a single cause of action, the court must try the issue raised as to the injunction, and, on demand of either party, submit the question of damages to a jury, and thereafter enter the proper judgment; and it is error to try the issue as to the injunction, enter judgment thereon, and continue the question of damages to a subsequent term of court.[683] The court may hear proof to assist him in rendering a judgment on default.[684]

§ 2984. Evidence.—Evidence sufficient to sustain a temporary injunction is not necessarily sufficient to support a like decision on the final merits.[685] In an action to restrain the destruction of a fence of a private road, a judgment in a prior action against plaintiff, holding such road to be a private way, is admissible against a third party to show that plaintiff has not consented to public use of the private street.[686]

It need not be shown that defendant used physical or actual violence to keep prospective customers from visiting plaintiff's restaurant; threats, acts, and intimidations are sufficient.[687] In an action for injunction, an allegation in the complaint that defendant is insolvent is not sustained on the testimony of plaintiff alone, when it appears from cross-examination that plaintiff's knowledge is hearsay.[688] In an action by one in possession of

680 Carpenter v. Danforth, 19 Abb. Pr. 225; Bank of Monroe v. Schermerhorn, Clark (N. Y.) 300.

681 Godey v. Godey, 39 Cal. 166; McCreery v. Brown, 42 Cal. 457; Rogers v. Tennant, 45 Cal. 186. See, also, Fuhn v. Weber, 38 Cal. 637.

682 Peterson v. Bean, 22 Utah, 43, 61 Pac. 213.

683 Stocker v. Kirtley, 6 Idaho, 795, 59 Pac. 891.

684 Cross v. Johnson, 20 Wash. 124, 54 Pac. 1000.

685 Colusa-Parrott Min. Co. v. Barnard, 28 Mont. 11, 72 Pac. 45.

686 Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646.

687 Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079.

688 Parker v. Furlong, 37 Or. 248, 62 Pac. 490.

land to restrain a city from appropriating it as a street, the burden is on the city to show title to said land.[689]

§ 2985. **Grounds for dissolution.**—If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.[690] A court that grants a preliminary injunction may, in the exercise of its judicial discretion, modify the injunction at any time before final judgment.[691] An injunction may be dissolved on the following grounds: 1. That the affidavit and papers on which it was granted were not legibly written; 2. That the injunction had not been served personally; 3. That the papers had not been filed.[692] The grounds of the injunction cannot be inquired into in a suit upon an injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond.[693]

Where in an action to enjoin defendant from trespassing on a mining claim and destroying plaintiff's end-gates, ditches, etc., there was no evidence that the ditch and the water in it were not the property of the defendants, the complaint was properly dismissed.[694]

§ 2986. **Injunction granted without notice.**—If an injunction be granted without notice, the person enjoined, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same.[695] The motion may be made—1. Upon the complaint and affidavits, or, in other words, the papers, whatever they may have been, upon which the injunction was granted; or 2. Upon papers upon which the injunction was granted, and affidavits on the part of defendant, with or without answer. If the defendant rests his motion upon

689 Oglesby v. City of Santa Barbara, 119 Cal. 114, 51 Pac. 181.

690 Cal. Code Civ. Proc., § 533.

691 Hobbs v. Amador etc. Canal Co., 66 Cal. 161, 4 Pac. 1147.

692 Johnson v. Casey, 28 How. Pr. 492.

693 Dowling v. Polack, 18 Cal. 625. See Rice v. Cook, 92 Cal. 144, 28 Pac. 219.

694 Parker v. Furlong, 37 Or. 248, 62 Pac. 490.

695 Cal. Code Civ. Proc., § 532. But see Cal. Code Civ. Proc., § 937; Fre-

the papers upon which the injunction is granted, the plaintiff can make no further showing, but must stand upon his complaint or his complaint and affidavits, as the case may be. If however, the defendant makes a counter showing by affidavit, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moves upon what he has prepared as his verified answer, he makes it an affidavit, in the sense of the statute, for all the purposes of his motion, and he cannot deprive the plaintiff of his rights to reply by calling it an answer instead of an affidavit.[696] It is no ground for dissolving an injunction upon a motion made upon the complaint alone, if the facts alleged in the complaint are sufficient to entitle the plaintiff to an injunction.[697]

§ 2987. **Motion to dissolve or vacate injunction.**—Where a motion to dissolve a preliminary injunction is heard on the bill and answer, the responsive allegations of the latter must be taken as true, and, if the equity of the bill is sworn away, dissolution of the injunction is proper.[698]

Under the code provision that, if an injunction be granted without notice, the defendant may apply, upon reasonable notice, to dissolve or modify the same, the court has no power to dissolve or modify the same without notice to the plaintiff.[699] Also, a provision permitting plaintiff to oppose an application to dissolve an injunction, either by affidavits or oral testimony, does not prevent him from using both methods.[700]

§ 2988. **Motion to modify.**—An order granting an interlocutory injunction, made on due notice, and after a full hearing, is regular, though it may be erroneous; and hence is not subject to motion to modify on the same facts.[701] An order modifying a temporary injunction is merely an interlocutory order, and is not *res adjudicata*, but the whole subject-matter may be retried and reviewed on final hearing of the cause.[702]

mont v. Merced, 9 Cal. 19; Borland v. Thornton, 12 Cal. 441.

696 Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76; Hiller v. Collins, 63 Cal. 235; Kahn v. Old Telegraph Min. Co., 2 Utah, 16.

697 Fuhn v. Weber, 38 Cal. 636.

698 Hampson v. Adams, 6 Ariz. 335, 57 Pac. 621.

699 Page v. Vaughn, 133 Cal. 335, 65 Pac. 740.

700 Butte etc. Cons. Min. Co. v. Montana Ore-Purchasing Co. (Mont.), 55 Pac. 112.

701 Butte etc. Cons. Min. Co. v. Frank, 24 Mont. 506, 62 Pac. 922.

702 Herring v. Wiggins, 7 Okla. 312, 54 Pac. 483.

§ 2989. Effect of dissolution.—The dissolution of an injunction is a technical breach of the injunction bond.[703] But a voluntary dismissal of an injunction does not necessarily constitute an admission that the injunction should not have been granted.[704] Where an injunction has been dissolved, and afterward reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it.[705] A judgment dismissing a suit in which a temporary injunction has been granted, for want of prosecution, amounts to a determination by the court that the injunction was improperly granted; and after such judgment. suit lies upon the injunction bond.[706] And, in California, the voluntary dismissal of an injunction suit by the plaintiff has the same effect as a decision of the court that plaintiff was not entitled to the injunction.[707]

§ 2990. Motion to dissolve on complaint and answer.—Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases.[708] When the complaint does not state a cause of action, an order refusing to dissolve an injunction is erroneous for that reason; and if facts pertaining to the knowledge of the defendant which are essential to the cause of action are alleged upon information and belief in the complaint, and are positively denied under oath in the answer, the injunction should be dissolved.[709] Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants. It was held that the injunction was properly dissolved, because the validity of defendant's title should be judicially determined before its assertion be enjoined.[710] Where the motion is made on complaint and answer, the answer

703 Stone v. Cason, 1 Or. 100.

704 Thompson v. Benson, 41 Wash. 70, 82 Pac. 1040.

705 Bentley v. Joslin, Hempst. 218, Fed. Cas. No. 18232.

706 Dowling v. Polack, 18 Cal. 625.

707 Asevado v. Orr, 100 Cal. 293, 34 Pac. 777.

708 Gardner v. Perkins, 9 Cal. 553; Johnson v. Wide West M. Co., 22 Cal. 479; Burnett v. Whitesides, 13 Cal. 156; Real Del Monte Co. v. Pond etc. Min. Co., 23 Cal. 82.

709 County of Yuba v. Cloke, 79 Cal. 239, 21 Pac. 740.

710 Curtis v. Sutter, 15 Cal. 263.

will be treated as an affidavit, and the plaintiff is entitled to reply to the answer by affidavits.[711]

§ 2991. **Time to make motion to dissolve.**—The motion to dissolve is limited to cases where the injunction is originally granted without notice.[712] If the injunction is granted upon notice, the remedy is by appeal.[713]

§ 2992. **Notice of motion to dissolve.**—Notice of motion to dissolve an injunction must be given in a reasonable time before the motion is made, unless the cause has been set down for hearing on the motion.[714] Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time.[715] The California code requires reasonable notice.[716] But an order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or it may be vacated or modified, upon notice, in the manner in which other motions are made.[717]

§ 2993. **Opposing motion to dissolve.**—If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the injunction was granted.[718] On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title.[719]

§ 2994. **Right to move to dissolve.**—The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section 118 of the

711 Falkinburg v. Lucy, 35 Cal. 52, 95 Am. Dec. 76; Hiller v. Collins, 63 Cal. 235.

712 Natoma Water etc. Co. v. Clarkin, 14 Cal. 551; Natoma Water etc. Co. v. Parker, 16 Cal. 83.

713 Curtis v. Sutter, 15 Cal. 265.

714 Wilkins v. Jordan, 3 Wash. C. C. 226, Fed. Cas. No. 17665. Notice required, when, see Burford v. Ringgold, 1 Cranch C. C. 253, Fed. Cas. No. 2152; Ramsey v. Wilson, 1 Cranch C. C. 304, Fed. Cas. No. 11545; Stoddert v. Waters, 1 Cranch C. C. 483, Fed. Cas. No. 13472.

715 Lawrence v. Bowman, 1 McAll. 419, Fed. Cas. No. 8134.

716 Cal. Code Civ. Proc., § 532.

717 Heffion v. Bowers, 72 Cal. 270, 13 Pac. 690; Cal. Code Civ. Proc., §§ 937, 1005.

718 Cal. Code Civ. Proc., § 532.

719 Hicks v. Michael, 15 Cal. 107.

Practice Act.[720] The privilege of moving for a dissolution of an injunction upon the filing of an answer is limited to cases where the injunction is originally granted without notice. Where the injunction is granted on a rule to show cause, it cannot be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction.[721] An order dissolving or discharging the restraining order is unnecessary when the injunction has been granted or refused.[722]

§ 2995. When injunction is dissolved.—Where an injunction is granted until further answer and further order, which is the usual form, it is never dissolved until the answer comes in, even though the defendant should live abroad.[723] If there are several defendants, the court will not, in general, dissolve the injunction until all have answered.[724] An injunction may be dissolved upon the coming in of an answer denying positively the equities of the bill.[725]

§ 2996. Dissolution of injunction against assessment.—Where assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the city, for the purpose of avoiding the payment of his portion of the assessment, it was held that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessments, leaving him, after the sale, to the technical rights which he set up, by reason, as

720 Cal. Code Civ. Proc., § 532; Natoma Water etc. Co. v. Parker, 16 Cal. 83.

721 Id. See Hefflon v. Bowers, 72 Cal. 270, 13 Pac. 690.

722 Knight v. Cohen, 5 Cal. App. 296, 90 Pac. 145.

723 Read v. Consequa, 4 Wash. C. C. 174, Fed. Cas. No. 11606.

724 Robinson v. Cathcart, 2 Cranch C. C. 590, Fed. Cas. No. 11946.

725 Orr v. Merrill, 1 Woodb. & M. 376, Fed. Cas. No. 10591; Orr v. Littlefield, 1 Woodb. & M. 13, Fed. Cas.

he claimed, of some irregularity in the mode of making the assessment.[726]

§ 2997. **Revival of injunction.** — The court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of.[727] Where an injunction has been dissolved, on the coming in of the answer denying the equity of the bill, and testimony has been taken and published tending to show the right of the complainant to relief, the injunction or application may be reinstated.[728] When the judgment is reversed, and the cause remanded for a new trial, it is returned to the lower court for a trial upon the issues, and it stands in the same attitude in all respects as before the former trial. If the plaintiffs were entitled to an injunction before the former trial, and the injunction was ordered, they were entitled to retain it upon the cause being remanded for a new trial.[729]

§ 2998. **New trial, effect of.**—Pendency of motion for a new trial does not operate as a suspension to an injunction.[730] In an action to try the right to a mining claim, a preliminary injunction is granted on plaintiff's motion, and, on appeal to the supreme court, a judgment in favor of plaintiff is reversed and a new trial granted; this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction.[731]

§ 2999. **Nonsuit, effect of.**—When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial.[732] If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the *remittitur* in the court below.[733]

No. 10590; United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998.

726 Weber v. City of San Francisco, 1 Cal. 455. See Esterbrook v. O'Brien, 98 Cal. 671, 33 Pac. 765.

727 Hicks v. Michael, 15 Cal. 107; Creanor v. Nelson, 23 Cal. 464.

728 Fanning v. Dunham, 4 Johns. Ch. 36; Travers v. Stafford, 2 Ves. 19; Radford's Exr. v. Innes' Exrs., 1 Hen. & M. (Va.) 8.

729 Hess v. Winder, 34 Cal. 270.

730 Ortman v. Dixon, 9 Cal. 23.

731 Hess v. Winder, 34 Cal. 270.

732 Id.; Harris v. McGregor, 29 Cal. 124.

733 Harris v. McGregor, 29 Cal 124.

§ 3000. **Reversal of judgment, effect of.**—A reversal of judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate court.[734]

§ 3001. **Judgment, effect of.**—When suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and, subsequently, at a final hearing, the court decides that such judgment was not fraudulent, but valid, it is held that the effect of such judgment is that plaintiff was not entitled to the restraining order.[735] Plaintiffs sued defendants for damages for their alleged trespass upon a certain portion of quartz-mining claims, alleging in the complaint that the property belongs to and is in the possession of plaintiffs, and asking an injunction against further trespasses, which was granted, the complaint also averring the insolvency of defendants. The defendants denied all the allegations of the complaint, and claimed ownership. The jury found, generally, "for defendants," and judgment was rendered in their favor for costs. Defendants then moved to amend the judgment by adding thereto the words "and that the injunction heretofore granted be and the same is hereby dissolved," which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer. It was held that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved.[736]

Where an interlocutory injunction granted in a suit to obtain a perpetual injunction is made perpetual by a decree entered by default, the interlocutory injunction will remain in full force on the default being set aside.[737] The grantee of one who has been enjoined from diverting the waters of a stream connected with his land is bound by the injunction, though he was not a party to the suit in which it was ordered.[738]

734 McGarrahan v. Maxwell, 28 Cal. 84.

735 Heyman v. Landers, 12 Cal. 107.

736 Brennan v. Gaston, 17 Cal. 372.

737 Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63.

738 Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93.

In an action where the demand for an injunction is only incidental to the main purpose or object of the suit, and other relief is demanded, and comes within the issues made, the relief demanded may be granted, although the necessity for an injunction has disappeared.[739] Findings and a judgment outside of the issues made by the pleadings cannot be sustained.[740] Also, a judgment enjoining trespass on premises not included in the description of the property in the complaint is erroneous.[741] A judgment perpetually enjoining the commission of certain acts, without any further adjudication, where the findings of facts and conclusions of law are full, and the decree follows them, is held a sufficient decree.[742]

Title to mineral veins is not determined in a suit to enjoin defendants from trespassing thereon; and the same cannot be determined in a contempt proceeding based on a violation of such injunction order.[743]

§ 3002. Judgment, effect of—Continued.—A decree on appeal in a suit to enjoin trespass does not give defendant a right to recover the value of hay cut from the land pending the preliminary injunction.[744] Where a county was restrained from paying certain warrants, and a bank from receiving payment of the same, the bank is not liable to the county for money collected by the assignees of the certificates.[745] The dismissal of an action on an injunction bond, though commenced before the decision on review of the judgment against the injunction, does not operate as a bar to future actions on the bond.[746]

A decree in a suit to restrain the use of a roadway is fatally defective if it varies much from the pleadings.[747] An injunction granted after a full hearing between the original parties to a non-negotiable note, not restraining the collection of such note, is a complete defense to a suit on the same by one claiming to be a *bona fide* purchaser before maturity.[748]

739 Wilson v. Boise City, 7 Idaho, 69, 60 Pac. 84.

740 Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044.

741 Tuckfield v. Crager, 29 Utah, 472, 82 Pac. 860.

742 Walker v. McGinnes, 9 Idaho, 162, 72 Pac. 885.

743 State v. District Court, 30 Mont. 96, 75 Pac. 956.

744 Gentry v. Pacific Live Stock Co., 45 Or. 233, 77 Pac. 115.

745 Multnomah County v. White, 48 Or. 183, 85 Pac. 78.

746 Tutty v. Ryan, 13 Wyo. 134, 78 Pac. 657; 79 Pac. 920.

747 Sowles v. Clawson, 28 Utah, 74, 76 Pac. 1067.

748 Randolph v. Hudson, 12 Okla. 516, 74 Pac. 946.

§ 3003. Service and enforcement of decree, effect of.—Where an interlocutory injunction granted in a suit to obtain a perpetual injunction is made perpetual by a decree entered by default, the interlocutory injunction will remain in full force on the default being set aside.[749] When a city treasurer has been enjoined from paying certain warrants, he is not excused from paying the same warrants if the owner is not a party to the action, and the judgment is for that reason void.[750]

§ 3004. Violation and punishment.—An insignificant technical violation of an injunction will not be punished as a contempt where the violation was not with any intention to disobey the injunction, such as where a foreman misunderstands a direction, and runs a drift in an easterly instead of a westerly direction, and thus encroaches on the claim of plaintiff, from which he is enjoined.[751] Where the statute authorizes an attachment for a contempt not committed in the immediate presence of the court, such attachment may issue for a defendant charged with violating an injunction restraining him from interfering with an irrigating ditch, since such violation constitutes a civil contempt.[752]

In a contempt proceeding, the validity of the order of court violated is not reviewable.[753] If a city and its mayor and council are enjoined from holding an election, the council and mayor are required to stop the election.[754] An election held contrary to a temporary injunction by the superior court is void.[755] A formal order supersedes the clerk's minutes, so that a person enjoined cannot be punished for a violation of the order as appearing in the clerk's minutes.[756] Entry on a mining claim to post notices of discovery is not a violation of an order restraining further trespass thereon.[757] A conveyance is held to be within an exception to an injunction restraining plaintiff in a divorce suit from disposing of his property except in the ordinary course

749 Nicoll v. Weldon, 130 Cal. 666, 63 Pac. 63.

750 Savage v. Sternberg, 19 Wash. 679, 67 Am. St. Rep. 751, 54 Pac. 611.

751 Boston etc. Cons. etc. Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 117, 60 Pac. 807.

752 Shore v. People, 26 Colo. 516, 59 Pac. 49.

753 State v. Reilly, 40 Wash. 217, 82 Pac. 287.

754 State v. Nicoll, 40 Wash. 517, 82 Pac. 895.

755 Amos Brown's Estate v. City of West Seattle, 43 Wash. 26, 85 Pac. 854.

756 State v. Bell, 34 Wash. 185, 75 Pac. 641.

757 Harley v. Montana Ore-Purchasing Co., 27 Mont. 386, 71 Pac. 407.

of business.[758] Imprisonment for non-payment of costs in a contempt proceeding for violation of an injunction is not warranted.[759]

§ 3005. **Proceedings in contempt—Affidavit.**—An affidavit for contempt in disobeying an injunction may be insufficient in not showing the persons connected with the injunction suit.[760] In contempt proceedings for violation of a water-right injunction, variance between the affidavit and the evidence may be immaterial.[761] An affidavit for contempt in violating an injunction restraining police officers from interfering with plaintiff's restaurant business, which fails to allege that one of his patrons was arrested because she had patronized such restaurant, is not sufficient.[762] An affidavit stating that defendant, in violation of the injunction, cut the bank of a ditch, and thereby so interfered with and destroyed it as to prevent defendant's proper use of it, is sufficient to give the court issuing the injunction jurisdiction of contempt proceedings against defendant.[763] Proceedings in contempt will be dismissed where plaintiff's affidavit leaves defendant's guilt to be established by inference—that it must be the defendant, since certain others did not do it.[764]

§ 3006. **Judgment in contempt.**—Appeal will not lie from a judgment of the district court committing a person to jail for willful violation of an injunction, since jurisdiction to review orders extends only to final judgments on indictment.[765] Contempt for violation of a restraining order to prevent the obstruction of a public highway may be brought by the state on relation of the prosecuting attorney of the county.[766] The Colorado code section requiring facts constituting a contempt to be set out in the judgment, applies only to contempts committed in the presence of the court, and punished summarily; and such facts

758 White v. Wise, 134 Cal. 613, 66 Pac. 959.

759 Wyo. Rev. Stats. 1899, § 4048; Porter v. State, 16 Wyo. 131, 92 Pac. 385.

760 State v. Peterson, 29 Wash. 571, 70 Pac. 71.

761 State v. Gray, 42 Or. 261, 70 Pac. 904, 71 Pac. 978.

762 Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409.

763 Shore v. People, 26 Colo. 516, 59 Pac. 49.

764 Boston etc. Cons. etc. Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 117, 60 Pac. 807.

765 Marinan v. Baker, 12 N. Mex. 451, 78 Pac. 531.

766 State v. Reilly, 40 Wash. 217, 82 Pac. 287.

need not be set out in a judgment for contempt in violation of an order restraining defendant from interfering with an irrigation ditch.[767] It is not error for a court to enter judgment declaring a defendant guilty of contempt, and committing him to jail until he pays a fine, at the same term at which the injunction is granted, and an attachment issued by a judge in chambers may commit the defendant to jail until the next term of court in which the injunction is pending to answer the contempt.[768]

§ 3007. **Wrongful injunction.**—In an action to recover damages for wrongfully suing out an injunction, malice and want of probable cause must be alleged and proved.[769] Action on the bond and for wrongfully suing out an injunction cannot be united.[770] Persons whose right to a mining claim depends on their paying part of the purchase price may be enjoined, and their later payment of the purchase price does not make the injunction wrongful.[771] An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court, through malice, and without probable cause. If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond.[772]

§ 3008. **Damages on dissolution.**—Defendant may recover damages, though the court had no jurisdiction.[773] And the measure of damages is the value of the property.[774] In an action to recover the damages caused by the wrongful suing out of an injunction, a party can recover the value of his labor for the time he was compelled to remain idle by being restrained from working his mining ground.[775] The measure of damages is the actual expense and loss occasioned, excluding remote damages, and in-

767 Shore v. People, 26 Colo. 516, 59 Pac. 49.

768 Id.

769 Hess v. German Banking Co., 37 Or. 297, 60 Pac. 1011.

770 Willey v. Nichols, 18 Wash. 528, 52 Pac. 237.

771 Yarwood v. Cedar Canyon Cons. Min. Co., 37 Wash. 56, 79 Pac. 483.

772 Robinson v. Kellum, 6 Cal. 399. See, also, Asevado v. Orr, 100 Cal. 293, 34 Pac. 777; Ruble v. Coyote Gold etc. Min. Co., 10 Or. 39.

773 Cumberland Coal Co. v. Hoffman Steam Coal Co., 39 Barb. 16; 15 Abb. Pr. 78.

774 Barton v. Fisk, 30 N. Y. 166.

775 Campbell v. Metcalf, 1 Mont. 378. See, also, Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327.

cluding all damages naturally and fairly traceable to the wrongful issuance of the injunction.[776]

§ 3009. Damages on dissolution—Attorney's fees.—Counsel fees for dissolving an injunction are recoverable in an action on the case, suit on the injunction bond not being the only remedy.[777] They are recoverable, though the attorney has not been paid; but evidence of the value of counsel fees in defending the merits of an injunction will not be admitted in an action to recover fees earned in obtaining a dissolution of the injunction. And the sheriff is not a necessary party in an action for damages for wrongful injunction of a sale under execution.[778] The undertaking in injunction does not cover counsel fees paid for the trial of the main issue, but only such as are paid for procuring the dissolution of an injunction improperly issued.[779] A district attorney wrongfully enjoined from prosecuting a crime is entitled to personally recover attorney's fees incurred in securing dissolution of the injunction.[780]

The fees of an attorney employed to resist an injunction cannot be recovered as damages, unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient.[781] Plaintiff must prove that he has actually paid the attorney fees and the expenses of procuring testimony.[782] Attorney fees are not recoverable where no motion for the dissolution of the injunction is made, and it is allowed to stand until defeated by a trial on the merits.[783] Where the damages are limited by the terms of the bond to such as the plaintiff may sustain by reason of the injunction, whatever expenses he is subjected to by reason of the

776 Rice v. Cook, 92 Cal. 144, 28 Pac. 219; Dougherty v. Dore, 63 Cal. 170.

777 Anderson v. Providence Life etc. Co., 26 Wash. 192, 66 Pac. 415; Littleton v. Burgess, 16 Wyo. 58, 91 Pac. 832, 16 L. R. A. (N. S.) 49.

778 Anderson v. Provident Life etc. Co., 26 Wash. 192, 66 Pac. 415.

779 Parker v. Bond, 5 Mont. 1, 1 Pac. 209; Porter v. Hopkins, 63 Cal. 53; Curtiss v. Bachman, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910; Miller v. Donovan, 13 Idaho, 735, 92 Pac. 991.

780 Littleton v. Burgess, 16 Wyo. 58, 91 Pac. 832.

781 Willson v. McEvoy, 25 Cal. 170.

782 Prader v. Grimm, 28 Cal. 11. See, also, City of Helena v. Brule, 15 Mont. 429, 39 Pac. 456, 852; Curtiss v. Bachman, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910; Creek v. McManus, 13 Mont. 152, 32 Pac. 675; Olds v. Cary, 13 Or. 362, 10 Pac. 786; Cook v. Greenough, 14 Mont. 352, 36 Pac. 357.

783 Donahue v. Johnson, 9 Wash. 187, 37 Pac. 322.

suit, or for counsel fees in defending the suit, are not damages within the terms of the bond.[784] In Oklahoma, attorney fees are not a proper element of damage in an action on an injunction bond.[785] Since injunction is ancillary to the principal relief, only such fees of the attorneys as are chargeable against the motion to dissolve are recoverable on the injunction bond.[786] Counsel fees incurred in preparing the motion to dissolve an injunction are within the conditions of the bond and recoverable, but fees for resisting the application for the injunction are not; and the fees should be rejected as elements of damage when they include pay for services before and after the issuance of the injunction, and are not apportionable.[787] Defendant is not entitled to attorney fees incurred in an unsuccessful attempt to dissolve the injunction.[788]

§ 3010. **Damages on dissolution—Duration of.**—The functions of a preliminary injunction cease when the final decree is made, and damages subsequently accrued cannot be recovered from the sureties, although the final decree be reversed on appeal.[789] The usual bond being given, an order was made to show cause on August 29th, why an injunction should not issue. A restraining order in the mean time was issued. The case was continued, and. finally, on the hearing, the order was dissolved, the injunction denied, and the suit dismissed. In an action on the bond, it was held that the restraining order embraced the time between its issuance and the hearing, and that damages should be allowed beyond August 29th.[790]

The form of an undertaking does not in terms provide for damages accruing after the preliminary order for an injunction has ceased to be operative, and the liability of sureties will not be extended by construction beyond the terms of the undertaking.[791] A bond is without consideration if the order requir-

784 Curtiss v. Bachman, 110 Cal. 433, 52 Am. St. Rep. 111, 42 Pac. 910. See San Diego Water Co. v. Pacific etc. S. S. Co., 101 Cal. 216, 35 Pac. 651; Swett v. Mowry, 71 Hun, 381, 25 N. Y. Supp. 32; Whiteside v. Noyac Cottage Assoc., 84 Hun, 555, 32 N. Y. Supp. 724; Randall v. Carpenter, 88 N. Y. 293.

785 Frantz v. Saylor, 12 Okla. 39, 69 Pac. 794.

786 Church v. Baker, 18 Colo. App. 369, 71 Pac. 888.

787 Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

788 Thompson v. Benson, 41 Wash. 70, 82 Pac. 1040.

789 Lambert v. Haskell, 80 Cal. 611, 22 Pac. 327.

790 Prader v. Grim, 13 Cal. 585.

791 Webber v. Wilcox, 45 Cal. 302.

ing it does not make the continuance of the restraint conditional on the giving of the bond.[792] The voluntary dismissal of an action before decision on a motion to dissolve an injunction cannot preclude defendant from recovering on the injunction bond his counsel fees incurred as part of the damages sustained by the injunction.[793]

§ 3011. Damages on dissolution—Measure of.—Where the allegations of the petition as to damages are not controverted, the court should determine their amount.[794] Damages for encroachment of a city on abutting property cannot be recovered in a suit to enjoin the collection of an improvement assessment, where the injunctive relief cannot be properly granted.[795] The amount of recovery on an injunction bond is governed by the conditions of the bond, but never more than that prescribed by the code.[796] Injury to a coal-mine by its being stopped is an injury to the realty for which the equitable owner of the realty is entitled to recover damages.[797] The depreciation in value of corporation stock, sale of which is restrained, is recoverable in action on an injunction bond; and defendant cannot claim that plaintiff held title in fraud of creditors, or that the stock belonging to a minor had not been ordered sold by a probate court.[798]

Sureties on a bond to make a restraining order effective are not liable for the appearance fee of the party restrained.[799] Plaintiff is only entitled to such proximate damages as he can establish with reasonable certainty.[800] Where plaintiff had been restrained from using a machine, the measure of damages would be the difference in cost of the cans manufactured with and without the use of the machine.[801] The measure of damages is not the rental value of a building which must be torn down to be moved, but the interest on the value of the materials in the building, together with any depreciation in value because of the

792 Alaska Imp. Co. v. Hirsch, 119 Cal. 249, 47 Pac. 124, 51 Pac. 340.

793 Frahm v. Walton, 130 Cal. 396, 62 Pac. 618.

794 Gohres v. Illinois & J. Gravel Co., 40 Or. 516, 67 Pac. 666.

795 Davis v. City of Silverton, 47 Or. 171, 82 Pac. 16.

796 Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

797 Quinn v. Baldwin Star Coal Co., 19 Colo. App. 497, 76 Pac. 552.

798 Slack v. Stephens, 19 Colo. App. 538, 76 Pac. 741.

799 White Pine Lumber Co. v. Ætna Indemnity Co., 42 Wash. 569, 85 Pac. 52.

800 San Jose Fruit-Packing Co. v. Cutting, 133 Cal. 237, 65 Pac. 565.

801 Id.

injunction.[802] Attorney fees in procuring the dissolution of an injunction in the federal court are recoverable as damages in a suit on the injunction bond in the state court, though they are not allowed in the federal court.[803]

§ 3012. Damages on dissolution—Time to sue.—Suit cannot be maintained on an injunction bond pending a petition in error from a judgment dissolving the injunction.[804] Defendant must show by his pleadings that the suit is not yet settled, and that action on the bond is prematurely brought.[805]

§ 3013. Parties to suit.—Where a mayor and council are enjoined, and the injunction dissolved, an action on the bond should be brought in the name of the city, and it is no defense that the suit in which injunction issued was not brought against proper parties.[806] A county treasurer may sue in his own name on an undertaking given to him in an injunction restraining him from collecting taxes, though the county has reimbursed him, and he is liable to the county for any damages obtained. And the treasurer may be allowed to bring action after his term of office has expired.[807] An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each or all of the obligees from damage or injury.[808]

§ 3014. Damages on dissolution—Pleadings.—The complaint in a suit on an injunction bond conditioned to pay damages must allege that the damages have not been paid.[809] The allegation that the plaintiff has been injured and damaged in a certain sum by reason of the issuance and continuance of the injunction does not allege non-payment by implication.[810] Voluntary dismissal

802 Ridpath v. Merriam, 22 Wash. 311, 60 Pac. 1120.

803 Tullock v. Mulvane, 61 Kan. 650, 60 Pac. 749.

804 Tutty v. Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

805 Montana Min. Co. v. St. Louis Min. etc. Co., 23 Mont. 311, 58 Pac. 870.

806 Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938.

807 Breeze v. Haley, 13 Colo. App. 438, 59 Pac. 333.

808 Summers v. Farish, 10 Cal. 347.

809 Van Horn v. Holt, 30 Mont. 69, 75 Pac. 680; Bebee v. Jackson, 32 Mont. 217, 79 Pac. 1051.

810 Curtiss v. Bachman, 84 Cal. 216, 24 Pac. 379.

of the injunction does not necessarily constitute an admission that the injunction should not have been granted.[811]

§ 3015. Damages on dissolution—Defenses.—Want of jurisdiction to issue injunction is no defense in an action on the bond.[812] On a plea in abatement, the action on the bond should be dismissed rather than be continued pending a decision on the writ of error.[813] Where a complaint is made against the sureties on an injunction bond for costs, damages, etc., on breach of the bond, they are entitled to defend against the demand, and the court cannot summarily enter judgment against them.[814] The failure to issue a formal injunction after execution of the bond, where the words granting the injunction are sufficient, is no defense on the bond.[815]

In an action for damages on an undertaking given on suing out an injunction, the defendants cannot object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance.[816] An answer which pleads settlement of the original suit, which by its terms was limited to such controversies as then existed, is no defense to an action on the injunction bond, the cause of action upon which subsequently arose; and though a demurrer would be more appropriate as a means of testing its sufficiency, it is so clearly bad that a motion to strike it out is proper.[817]

The plaintiff in an injunction suit, which has been finally determined by a judgment against him, cannot go behind the judgment and relitigate questions as to his right to the writ, in an action against him on his bond to recover damages for its breach.[818] Where defendant had enjoined the collection of a tax, and is now sued on the bond, it is no defense that plaintiff, a county treasurer, had been reimbursed by the county to the full amount of his damages in fighting the injunction.[819]

811 Thompson v. Benson, 41 Wash. 70, 82 Pac. 1040.

812 Boise City v. Randall, 8 Idaho, 119, 66 Pac. 938.

813 Tutty v. Ryan, 13 Wyo. 134, 78 Pac. 657, 79 Pac. 920.

814 Dougal v. Eby, 11 Idaho, 789, 85 Pac. 102.

815 Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

816 Cunningham v. Breed, 4 Cal. 384.

817 Silcox v. Lang, 78 Cal. 118, 20 Pac. 297.

818 Fullerton v. Pool, 9 Wyo. 9, 59 Pac. 431.

819 Haley v. Breeze, 13 Colo. App. 435, 59 Pac. 212.

§ 3016. Damages on dissolution—Evidence.—Where plaintiff, without contradiction, stated that he agreed with attorneys to move for the dissolution of an injunction for a certain sum, and had paid them, it is immaterial that the receipt did not specify that it was for such services, even though the same attorneys had done other work for the plaintiff.[820] Where, in an action on injunction bond, damages are claimed for injury suffered both because of a written contract and an oral contract, evidence of conversations which clearly appeared to relate only to the written contract was improperly admitted to show the oral contract.[821] It is not error to exclude testimony offered by defendant, in a suit on the bond, as to the use and flow of water, for the reason that it had been adjudicated in the injunction suit, and this testimony might have been admitted then.[822] It is error to admit a finding of fact made in the injunction suit which recites that plaintiff was justified in bringing the injunction suit, when the judgment dissolving the temporary injunction is inconsistent with such finding.[823]

FORMS IN INJUNCTION.

§ 3017. For restoration of personal property threatened with destruction, and for an injunction.

Form No. 754.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is, and at all times hereinafter mentioned was, the owner of [a portrait of his father, or other relative], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

II. That on the . . . day of . . ., 19.., he deposited the same for safe-keeping with the defendant.

III. That on the . . . day of . . ., 19.., he demanded the same from the defendant, and offered to pay all reasonable charges for the storage of the same.

820 Frahm v. Walton, 130 Cal. 396, 62 Pac. 618.

821 San Jose Fruit-Packing Co. v. Cutting, 133 Cal. 237, 65 Pac. 565.

822 Fullerton v. Pool, 9 Wyo. 9, 59 Pac. 431.

823 Bryant v. Anderson, 24 Nev. 326, 53 Pac. 497.

IV. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, cut, or injure the same, if required to deliver it up.

V. That no pecuniary damages would be an adequate compensation to the plaintiff for the loss of the said [painting].

Wherefore, the plaintiff demands judgment:

1. That the defendant be restrained by injunction from disposing of, injuring, or concealing the said [painting].

2. That he return the same to the plaintiff.

[VERIFICATION.]

§ 3018. For an injunction restraining waste and injury.

Form No. 755.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is the owner in fee of [describe the property].

II. That the defendant is in possession of the same, under a lease from the plaintiff, a copy of which is hereto attached, marked "A," and made part hereof.

III. That the defendant has [cut down a number of valuable trees, and threatens to cut down many more, for the purpose of sale], in violation of the terms of said lease, and without the consent of the plaintiff.

Wherefore, the plaintiff demands judgment, that the defendant be restrained by injunction from committing or permitting any further waste on said premises.

[VERIFICATION.]

§ 3019. The same—For injunction and damages.

Form No. 756.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff being then, and ever since, owner in fee of the premises hereinafter mentioned, on the . . . day of . . ., 19.., by a lease in writing then made between the plaintiff and the defendant, under their hands and seals, the plaintiff leased to the defendant for five years from said date, at a yearly rent of . . . dollars, a certain dwelling-house, with barns and outhouses attached, and two hundred acres of land at . . ., in the county of . . ., the property of the plaintiff.

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [Copy of the covenant as to waste.]

III. That the defendant took possession of the premises under said lease.

IV. That he has plowed up the garden, destroying the shrubbery and flowers therein, and has cut down six shade-trees, and has also cut down forty fruit-trees in the orchard [or state other waste, according to the fact], and has otherwise suffered and committed great waste on the premises; by reason of which waste the premises are worth . . . dollars less than they were when the defendant took possession thereof, and it would cost . . . dollars to restore them.

V. That the defendant threatens to cut down other of the ornamental, shade, and fruit trees, and to remove the partitions in the house, and turn it into a workshop [or other threatened waste].

Wherefore the plaintiff asks judgment:

1. That he pay to the plaintiff . . . dollars damages done to and suffered by the premises.

2. That he be required to keep the same in good repair and condition during the continuance of his interest therein, and to manage and cultivate the farm in a proper and husbandlike manner, according to the term of the lease.

3. That he be enjoined from committing any further waste, and particularly from [state particular act to be enjoined], and for other proper relief.

[VERIFICATION.]

§ 3020. To restrain the use of plaintiff's trademark.

Form No. 757.

[TITLE.]

The plaintiff complains, and alleges:

I. That heretofore, to-wit, in the year 19.., at said city and county, the plaintiff invented, manufactured, and made an article for the restoring and strengthening of the human hair, to be used upon the head and hair, and gave to said article the name by which it was and is known, of . . . hair restorative.

II. That he is now, and for a long time has been, and at the time of and before the committing of the grievances hereinafter

mentioned was, the manufacturer of said article, which he has for a long time offered for sale, and sold in glass bottles labeled with his own proper labels, devices, and trademarks, and in wrappers or circulars, all of which were composed, invented, and adopted by this plaintiff for that purpose, specimens or copies of which labels, devices, and trademarks, and wrappers or circulars, are hereto annexed, and form part of this complaint, marked "Exhibit A," and "Exhibit B," the first being a copy of the label, and the second a copy of the wrapper or circular.

III. And plaintiff further alleges that by reason of his knowledge and long experience and great care in his said business of manufacturing and making, and the good and useful quality of the said article, the same became and was at and before the time of the grievence hereinafter mentioned, widely known to the community as a valuable and useful article, and acquired a high reputation as such, and commanded, and still commands, as a valuable and useful article, an extensive sale at the said city of . . ., and throughout the said state of . . ., which is, and for the last . . . years has been, a source of great profit to the plaintiff.

IV. That said article is known to the public, and to the buyers and consumers thereof, by the name of . . . hair restorative, and by this plaintiff's own proper devices, trademarks, labels, and wrappers or circulars.

V. That notwithstanding the long and quiet use and enjoyment by this plaintiff of said name, devices, trademarks, labels, and wrappers or circulars, the defendant, well knowing the premises, but willfully, wrongfully, and unlawfully disregarding the rights of this plaintiff therein, thereafter, to-wit, on or about the . . . day of . . ., 19.., willfully, wrongfully, unlawfully, and fraudulently prepared and offered for sale, and sold, and always has and does still and now offer for sale, and sell, at the said city of . . ., and elsewhere throughout said state of . . ., an article in imitation of the plaintiff's article, which, with intent to deceive and defraud the public, and the buyers and consumers thereof, and to injure and defraud this plaintiff, they have put up or caused to be put up in similar packages, to-wit, in glass bottles, labeled with nearly similar labels, devices, and trademarks, and with nearly similar wrappers or circulars, of which false and nearly similar labels, devices, trademarks, and wrappers or circulars,

specimens or copies are hereto annexed, and made part of this complaint, marked "Exhibit C," and "Exhibit D," the first being a copy of the spurious label, and the second a copy of the spurious wrapper or circular.

VI. That said last-mentioned and nearly similar labels, devices, trademarks, and wrappers or circulars are fraudulent, counterfeit, and spurious imitations of the plaintiff's labels, devices, trademarks, and wrappers or circulars; and that the defendants have, and at all times when selling or preparing any of said imitations of said article have had, full knowledge, and are and have been advised and informed, that the said imitated labels, devices, trademarks, and wrappers or circulars are and have been pirated or simulated and fraudulent counterfeits of the labels, devices, trademarks, wrappers, and circulars, invented, composed, and adopted by this plaintiff as aforesaid; all of which will more fully appear by reference to the exhibits hereto annexed and hereinbefore referred to.

VII. That said imitations and counterfeits are calculated to deceive the purchasers and consumers of plaintiff's said article, and the public in general, and actually have misled, and do still and now mislead, many of them to buy and purchase the article offered for sale and sold by the defendants, in the belief that it is the article manufactured by the plaintiff, and greatly to the diminution and damage of the business and profits of this plaintiff.

VIII. And further, that the plaintiff alleges that the article so prepared and put up and sold by the defendants, in imitation of the plaintiff's article, is a greatly inferior article, and that by reason of the premises the general esteem and reputation of the said article manufactured by the plaintiff has been injured greatly, to the diminution and damage of the business and profits of this plaintiff.

IX. And further, that the defendants for a long time past have caused, and do still cause, an advertisement, a copy of which is hereto annexed, and made a part of this complaint, marked "Exhibit E," to be published in the daily . . . , and various other newspapers published in said city of . . . , and like advertisements in many other newspapers throughout the state of . . . , all of which actings, doings, advertisings, and publications are contrary to equity and greatly injure and damage said plaintiff.

X. And plaintiff further shows that the defendants have shipped and do still ship large quantities of the said imitation so prepared and put up by them, to be carried and offered for sale and sold out of this state, to the great diminution and damage of the business and profits of this plaintiff.

XI. And plaintiff further shows that, although before the commencement of this action the plaintiff repeatedly requested the defendants to desist from preparing, making, putting up, offering for sale, and selling said imitation, and from simulating, counterfeiting, imitating, and infringing the plaintiff's labels, devices, trademarks, and wrappers or circulars, and from publishing and causing to be published in the newspapers of this state, or any of them, the advertisement hereinbefore referred to, or any similar one, and from shipping any of said imitation, and carrying and offering the same for sale, and selling the same out of this state, yet the defendants have heretofore refused, and do still refuse so to do, but threaten to continue to do as they have heretofore done, and as they are hereinbefore alleged to have done.

XII. That by reason of the premises plaintiff has been injured and sustained damage to the amount of . . . dollars.

XIII. And plaintiff further shows that he is without any adequate remedy at law for the grievances, wrongs, injuries, and frauds so practiced upon him by the defendant aforesaid, and is entirely remediless without the equitable interposition of the courts.

[DEMAND OF JUDGMENT.]

§ 3021. Allegation in case of a periodical publication.

Form No. 758.

That he is the proprietor and publisher of a newspaper [or, magazine, or other periodical] at . . ., known and distinguished as [name of publication]; and that as such proprietor he has published the same daily [or otherwise] for . . . years last past, and that such publication has been made by the plaintiff, and those through whom he purchased the same, as the owners and proprietors thereof, since the original establishment of the same in the year . . ., under the name of . . .

§ 3022. Against purchaser of goods, and for injunction restraining sale.

Form No. 759.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale.]

II. That to induce the plaintiff to make said sale and delivery, and with intent to defraud him of said goods, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth . . . dollars, over and above all his just debts and liabilities, when in truth he was at the time insolvent; and that the plaintiff was induced by said fraudulent representations to sell and deliver to the defendant, and so did solely on the faith thereof.

III. That thereafter, and with such intent, defendant removed said goods to . . ., and, as the plaintiff is informed and believes, is about to sell and dispose of the same.

IV. That the defendant is insolvent, and, as the plaintiff is informed and believes, a judgment against him will be unavailing and worthless if he is suffered to sell and dispose of said goods.

Wherefore, the plaintiff demands judgment against the defendant, for the sum of . . . dollars, with interest thereon from the said . . . day of . . ., 19.., and that the defendant and his agents be enjoined from selling, disposing of, removing, or in any wise interfering with said goods or any of them, until such judgment be fully satisfied.

§ 3023. To restrain negotiation of bill or note.

Form No. 760.

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [Allege making of note.]

III. That the defendant still retains said note in his possession; and though, on the . . . day of . . ., 19.., the plaintiff requested him to deliver it up, he refused so to do.

Wherefore, the plaintiff demands judgment:

1. That the defendant be enjoined from negotiating, transferring, or enforcing the same.

2. That said note be delivered up and canceled.

3. And for the costs of this action.

§ 3024. Interpleader.

Form No. 761.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the making of the claims hereinafter mentioned, one A. B. deposited with the plaintiff [describe the property] for [safe-keeping].

II. That the defendant C. D. claims the same [under an alleged assignment thereof to him from the said A. B.].

III. That the defendant E. F. also claims the same [under an order of the said A. B., transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to, and hereby offers to deposit the same in court, or to deliver the same to such persons as the court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

Wherefore the plaintiff demands judgment:

1. That the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation thereto.

2. That they be required to interplead together concerning their claims to the said property.

3. That some person be authorized to receive the said property pending such litigation.

4. That upon delivering the same to such receiver the plaintiff be discharged from all liability to either of the defendants in relation thereto.

5. And that the plaintiff's costs be paid out of the same.

§ 3025. Injunction before answer—Affidavit in support of complaint.

Form No. 762.

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says, as follows:

I. I am the attorney in fact of the said A. B., plaintiff in this action, for the purpose of suing for and recovering the [sum of money] mentioned in the complaint, by virtue of a power of attorney under seal, for that purpose duly executed and delivered.

II. That said A. B. is now absent from the city of . . . and is now, as I verily believe, a resident of . . ., in the republic of Mexico, he having left the city of . . . for . . ., on or about the . . . day of . . ., 19..

III. I have read the complaint filed in this action, and know the contents thereof, and I have information as to all the matters stated therein [give sources of information], and, from such information, I believe such matters to be therein truly stated and such complaint to be true.

[JURAT.] [SIGNATURE.]

§ 3026. Affidavit in support of complaint by agent or clerk of defendant.

Form No. 763.

[TITLE.]

[VENUE.]

A. B., of . . ., being duly sworn, says, as follows:

I. I am familiar with all the material matters stated in the complaint in this action on the information and belief of the plaintiff, and have actual knowledge thereof; and from such knowledge I know that the matters of fact therein stated are true.

II. Until within a few days last past, I was in the employ of said defendant as bookkeeper, and had free access to the books of said copartnership and of said defendant, and had and have personal knowledge of the financial and other business matters of the said concern, and of said defendant.

§ 3027. Undertaking on injunction.

Form No. 764.

[TITLE.]

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the state of California, in and for the said county of . . ., against the above-named defendant, and is about to apply for an injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the [affidavit] filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the said county of . . ., in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the

sum of . . . dollars, and promise to the effect, that in case said injunction shall issue, the said plaintiff will pay to the said party enjoined such damages, not exceeding the sum of . . . dollars, as such party may sustain by reason of the said injunction, if the said superior court finally decide that the said plaintiff was not entitled thereto.

[DATE.] [SIGNATURES AND SEALS.]

[Justification as in Form No. 677.]

§ 3028. Order of injunction.

Form No. 765.

[TITLE.]

To . . .

The plaintiff in the above-entitled cause having commenced an action in the superior court of the state of California, in and for the said county of . . ., against the above-named defendant, and having prayed for an injunction against the said defendant, requiring . . . to refrain from certain acts in said complaint, and hereinafter more particularly mentioned;

On reading the said complaint in said action, duly verified by the oath of . . ., and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

It is therefore ordered by me, A. B., the judge of said superior court, that until further order in the premises, you, the said . . ., and all your counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from [here state acts to be enjoined, as in subsequent forms].

Dated this . . . day of . . ., 19..

A. B., Judge.

§ 3029. Writ of injunction.

Form No. 766.

[TITLE.]

The People of the State of California to . . . send greeting:

The above-named plaintiff having filed . . . complaint in our superior court of the state of . . ., in and for the county of . . ., against the above-named defendant, praying for an injunc-

tion against said defendant, requiring . . . to refrain from certain acts in said complaint, and hereinafter more particularly mentioned;

On reading the said complaint in this action, duly verified [if affidavits are used, describe them], and it satisfactorily appearing to said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given:

We, therefore, in consideration thereof, and of the particular matters in the said complaint set forth, do strictly command you, and each and every of you, that until the further order of said court, you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you, or either of you, do absolutely refrain from and desist from [here state acts to be enjoined].

[Tested, dated, and sealed as other writs.]

§ 3030. Order to show cause, and restraining order.

Form No. 767.

[TITLE.]

On the complaint of the plaintiff, duly verified [and upon the affidavits of . . ., and . . .], copies of all which are hereto attached:

It is ordered, that the said defendant show cause before me [or, before this court], at . . ., on the . . . day of . . ., 19.., why an injunction should not be granted restraining him from [here state acts to be enjoined], and for such other and further relief as may be just;

And it is further ordered, that said defendant, his agents and servants, be in the mean time restrained, and he, the said defendant, and each of his agents and servants, are hereby forbidden to suffer or commit any of said acts until the further order of the court.

[DATE.] [SIGNATURE OF JUDGE.]

§ 3031. Notice of motion for reference to ascertain damages.

Form No. 768.

[TITLE.]

Please take notice that on the undertaking and all of the files, records and proceedings in the above-entitled action, the under-

signed will move the court on the . . . day of . . . , 19 . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, for a reference to ascertain the damages sustained by the defendant by reason of the injunction granted in said action on the . . . day of . . . , 19 . . , and for such other or further order as may be just, and for the costs of this motion.

[DATE.] [SIGNATURE.]

§ 3032. Notice of motion for injunction.

Form No. 769.

[TITLE.]

To . . . , Defendant's Attorney:

Please take notice, that on the complaint [or affidavit] in this action [and the affidavits of . . . and . . . , copies of which are hereto attached], the undersigned will move the court, at the [courtroom], at . . . , on the . . . day of . . . , 19. . , at . . . o'clock, A. M., or as soon thereafter as counsel can be heard, for an injunction to restrain the defendant, his agents and servants, from [state for what the injunction is required], and for such other or further order as may be just.

[DATE.] [SIGNATURE.]

§ 3033. Statements in motion against violation of covenant to build.

Form No. 770.

From erecting upon [describe the land] any brewery or slaughterhouse.

§ 3034. Against resuming practice after having sold business.

Form No. 771.

From practicing as an attorney or solicitor in any part of . . . , either in his own name or the name of any other person; and from endeavoring to induce any persons who were the clients of A. & B. to cease or abstain from employing B. & C. as their attorneys or solicitors, and to cease the practice of the law in any manner in the said town of . . .

§ 3035. Against carrying on business forbidden by lease.

Form No. 772.

From carrying on the hardware business, or selling hardware in the store, No. . . . street, in the city of . . . ; and from conducting therein any business other than [state what].

§ 3036. Against removing fixtures.

Form No. 773.

From removing or causing to be removed from the premises hereinafter described any outhouse, shed, building, or addition, timber, building materials, or fixtures of any kind or character. Said premises are known as follows: [Description.]

§ 3037. Against underletting.

Form No. 774.

For granting or making, or contracting to grant or make, any lease, under-lease, or assignment of any part of the premises [designating them] demised by E. F. to G. H., by a lease dated on the . . . day of . . . , 19. . , and from granting or conveying the same in any manner or form, or by any means.

§ 3038. Against transfer of stock by corporation.

Form No. 775.

From selling or transferring or issuing other stock therefor to one "A. B." or to any other person, . . . shares of the capital stock of the . . . company, which is standing on the books of the said company in the name of . . . ; and the said company in like manner to be restrained from permitting or making any sale, by public auction or otherwise, of said stock, or any part thereof, or from transferring the same on the books of said company, in any manner or by any means, or at all.

§ 3039. In creditors' suits—Against selling and conveying property.

Form No. 776.

From selling or conveying, by deed or otherwise, the following-described property [describe it], or selling, conveying, or oth-

erwise transferring or incumbering any real or personal property held by you in trust, or otherwise acquired, received, or obtained from, by, or through [state how, or through whom, showing trust property or otherwise].

§ 3040. Against transferring assets.

Form No. 777.

From selling, assigning, transferring, pledging, or otherwise disposing of any of his property, except what is by law exempt from execution; or from in any manner interfering therewith until the further order of the court.

§ 3041. Against transferring negotiable paper.

Form No. 778.

From indorsing, assigning, or in any way transferring [describe note or bill], drawn by A. B. in favor of the above-named C. D., for . . . dollars in gold coin, bearing date the . . . day of . . ., 19.., and payable . . . months after said date, and accepted by the said C. D.

§ 3042. To restrain proceedings at law—On contract.

Form No. 779.

To restrain the defendant from proceeding further in his action at law against the above-named . . ., upon the bond of the said A. B., dated the . . . day of . . ., 19.., and from instituting or proceeding in any new or other action at law upon such bond; and from commencing any action or actions against the plaintiff for the recovery of [designating the alleged debt].

§ 3043. Against entering confession of judgment.

Form No. 780.

From entering up judgment on a warrant of attorney [or, statement of confession], executed by the plaintiff to the defendant [or otherwise naming the parties], and dated on or about the . . . day of . . ., 19.., and from commencing any proceedings thereon.

§ 3044. Against proceedings at law—Ejectment.

Form No. 781.

To restrain the defendant, . . ., from proceeding further against the plaintiff, . . ., in this action commenced against him in the superior court of the state of . . ., for the county of . . ., for the recovery of the possession of [describe the premises], and also from instituting any action or proceeding in any new or other action at law for the recovery of the possession of said premises, or any part thereof, either in said court or in any other court.

§ 3045. Nuisances—Against building a railroad on plaintiff's land.

Form No. 782.

From entering upon any part of the lands hereinafter described, for the purpose of constructing a railroad thereon, or from laying down a railroad track thereon, or from maintaining a railroad thereon, or running cars across, over or upon the said land. The said premises are known as . . ., and bounded and described as follows: [Description.]

§ 3046. Against laying a railroad in the streets of a city.

Form No. 783.

From entering into or upon . . . street, in said city, for the purpose of laying or establishing a railroad therein, and from digging up or subverting the soil, or doing any other act in said street tending to obstruct or incumber it, or to prevent the free and common use thereof, as the same has been heretofore enjoyed, and from laying down any ties or railroad iron therein.

§ 3047. The same—Another form.

Form No. 784.

That an injunction order may be issued by this court, directed to the said defendants, and each of them, their agents, servants, and attorneys, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, or any other person or persons whomsoever, from laying a double or any track for a railway in Battery street, from Jackson to Bush street,

in the city and county of San Francisco, or any railway whatever in said Battery street, or from breaking or removing the pavement, or in any other manner obstructing the said street, preparatory to or for the purpose of laying or establishing any railway therein, or from maintaining or running or operating a railroad therein.

§ 3048. Against continuance of slaughterhouse.

Form No. 785.

From using or occupying a building erected by the defendant, C. D., on the east side of . . . street, between . . . and . . . , in the city of . . . , as a slaughterhouse, and from slaughtering any animals or from dressing any slaughtered animals in such building, and from permitting the building to be used as a slaughterhouse by others.

§ 3049. Burning brick.

Form No. 786.

From burning or manufacturing, or causing to be burned or manufactured, bricks on a certain piece of land or premises in the defendant's possession [describe premises], situate in the town of . . . , in the county of . . . , and whereon is erected a brick-kiln, or from permitting or causing bricks to be burned or manufactured thereon.

§ 3050. Against erecting and to compel removal of buildings.

Form No. 787.

From continuing the erection of a certain projected building on the garden, grounds, or plat of ground, described as follows: [description], or any part thereof; and also from permitting or allowing such part of said building as has already been erected on said described garden or plat of ground from remaining thereon.

§ 3051. Against the diversion of water.

Form No. 788.

From diverting the waters, or any part thereof, of the American river, at . . . , so that the whole of said waters will not flow down its natural channel to . . .

§ 3052. Against flooding mining claim.

Form No. 789.

From permitting the flood-gates of the defendant's reservoir to be open in such a manner as that the waters therefrom shall thereby flood the said plaintiff's mining claim in . . . canyon, and thereby make it inconvenient or impossible for plaintiff to work said mine.

§ 3053. Against building pier or wharf.

Form No. 790.

From constructing, or causing to be constructed, a certain wharf at . . . , whereby vessels cannot enter or leave with convenience or safety at plaintiff's wharf, which wharf extends from the foot of . . . street into the bay [or state facts as they exist].

§ 3054. Against selling or disposing of partnership property.

Form No. 791.

That defendant be restrained from selling, assigning, or otherwise disposing of any of the property, personal or real, belonging to the copartnership above named, and from collecting, receiving, or otherwise handling said property, or any part thereof, except to retain the same; from changing position of or transporting, moving, or conveying any of the personal property or moneys of said copartnership.

§ 3055. Injunction against publishing book.

Form No. 792.

From printing, publishing, selling, or exposing for sale, or causing or being in any way concerned in the printing, publishing, or selling, or exposing for sale, or otherwise disposing of any copies of [describe the book], or any other book purporting to be or to resemble the book so printed, published, and sold by or for plaintiff.

§ 3056. Against publishing private letter.

Form No. 793.

From printing, publishing, selling, or causing to be sold or exposed for sale, or circulating, or in any manner, either by writing or otherwise, making public a letter written by . . . , on or about

the . . . day of . . . , 19 . . , and forwarded to . . . , at . . . , or any part thereof [or, for a number of letters: written by A. B. to C. D., between the . . . day of . . . , 19. . , and the . . . day of . . . , 19 . .].

§ 3057. Against use of secret in trade.

Form No. 794.

From selling, or causing or procuring to be sold, under the title and designation of "Walker's Vinegar Bitters," any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicines according to the secret in the complaint mentioned, etc., and from in any manner using the secret of compounding the said medicines, or any part thereof.

§ 3058. Against public officers—Quo warranto, from usurping office.

Form No. 795.

From usurping, taking possession of, interfering with, or in any manner disturbing the plaintiff in the use, enjoyment, advantages, or benefits of [describe office], and from taking the fees or emoluments of said office, and from doing any act under or by the name of said office.

§ 3059. In trespass—Against undermining plaintiff's land.

Form No. 796.

From digging, undermining, excavating, or removing any soil from any land adjoining the plaintiff's premises [describing them], which shall cause the plaintiff's land, by reason of the removal of the said earth, to fall away or subside.

§ 3060. Trademarks—From using plaintiff's trademark.

Form No. 797.

From selling, exposing for sale, or causing to be sold [state what], or any other article or thing with similar labels to the plaintiff's, as hereinafter described, or in like boxes, or with like or similar devices thereon, in any manner or by any means, so

that the article so put up or sold will be taken for that which this plaintiff has hitherto put up and sold under the name and style and by the device, etc., of [describe device particularly].

§ 3061. Against infringement of sign.

Form No. 798.

From running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus having painted, stamped, printed, or written thereon the words or names, "London Conveyance," or "Original Conveyance Company," or any other names, words, or devices, painted, stamped, printed, or written thereon in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.

§ 3062. Waste—Affidavit to obtain order to restrain waste.

Form No. 799.

[TITLE.]

[VENUE.]

A. B., the plaintiff above named, being duly sworn, says, as follows:

I. This action is brought [state the object of the action], and all the allegations of said complaint are true to the knowledge of the deponent.

II. On or about the . . . day of the present month of . . . , the defendant proceeded to cut and take off, and put up in cordwood, the wood and timber then growing and being on said premises, and has now cut and piled up on said premises, ready to be taken therefrom, as I am informed and believe, several hundred cords of said cordwood, of the value of . . . dollars; and I further say that the said wood and timber so cut and corded is not required for the necessary reparation of any fences, buildings, or erections which were upon said premises at the time of the said sale, nor for the necessary firewood for the use of the family of the said . . . ; but, to the contrary thereof, I am informed and believe that the said defendant has made preparations to destroy the remaining wood and timber growing upon said premises, and continues daily to cut the same; and I am also informed and believe that the said defendant, together with one C. D., and others whose names are un-

known to me, and to whom the said defendant has contracted or proposed to dispose of said wood, or a portion thereof, threaten to, and are actually proceeding, with their boatmen, cartmen, servants, and persons in their employ to take and remove and dispose of the said cordwood, wood, and timber; and I further say that the land so sold by me is valuable principally for the sake of said wood and timber, and that the destruction thereof, as aforesaid, is a permanent injury to the freehold. And the said defendants, after the removal of said wood, as I am informed and verily believe, intend to abandon said land when the said wood is so removed; and by such removal of said wood, the security for the amount yet due me on the purchase of said land will be lost and rendered of no value.

III. The defendant is wholly insolvent, and unable to answer the plaintiff in damages in the premises, and, as I verily believe, I will be left without remedy as to the timber already cut, unless the defendant is enjoined from removing or interfering with it.

§ 3063. Statement on motion enjoining waste.

Form No. 800.

From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part thereof, or from committing any waste, spoil, or destruction upon said premises, and removing the fences therefrom, or destroying or cutting down the timber thereon, and from executing and procuring to be executed any conveyance of the said premises to any person or persons other than the plaintiff, or as he shall direct.

The said premises are known as . . ., and are bounded and described as follows: [Description.]

§ 3064. Against waste by cutting timber.

Form No. 801.

From cutting down, felling, barking, or otherwise wasting or injuring any timber-trees, and from felling, digging up, or removing any ornamental trees therein, or underwood standing and growing on [designate the premises], and from committing any further or other waste or spoil in or upon the said land and premises.

§ 3065. Against destroying ornamental trees.

Form No. 802.

From committing waste, spoil, or destruction on [designate the premises], and from cutting down any timber or other trees growing upon the said estate, which are planted or growing there for the ornament of the said house, or which grow in lines, walks, vistas, or otherwise for the ornament of said houses, or of the gardens, parks, or pleasure-grounds thereunto belonging; and also to restrain him, his servants, workmen, and agents, from cutting down any timber or other trees, and from changing or removing the walks or drives therein, or widening or moving the same.

§ 3066. Against working a mine.

Form No. 803.

From working the ledges, veins, spurs, angles, or seams of gold, silver, copper, or iron, and other minerals lying in, upon, or under the [designate lands], and from digging, extracting, getting, and carrying away, or selling or disposing of, the gold, silver, copper, iron, and other minerals produced therefrom, or from mining any quartz or other rock which contains the same.

§ 3067. Injunction order after order to show cause.

Form No. 804.

[TITLE.]

On the return of the order to show cause made by me in the above-entitled action, on the . . . day of . . . , 19.. , and returnable this day, after hearing E. F. for the plaintiff, and G. H. for the defendant, no sufficient cause to the contrary being shown:

It is ordered that the said order to show cause be, and the same hereby is, made absolute, on the said plaintiff executing and filing a written undertaking pursuant to the statute and the practice of the court, to the effect that he will pay the said defendant such damages, not exceeding the sum of . . . dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And I order that the said defendant, and his agents and servants, be enjoined and restrained [state acts to be enjoined] until the further order of the court.

[DATE.] [SIGNATURE.]

§ 3068. Dissolving injunction—Notice of motion to dissolve.

Form No. 805.

[TITLE.]

To . . .

Please take notice, that on [designate papers], the undersigned will move the court at . . . , on the . . . day of . . . , 19. . , at . . . o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the injunction issued in this action be dissolved; and for such other or further relief as may be just.

[DATE.] [SIGNATURE.]

§ 3069. Affidavit for modification or vacation of temporary injunction.

Form No. 806.

[TITLE.]

[VENUE.]

C. D., being duly sworn, says:

That he is the defendant in this action, and that on the . . . day of . . . , 19. . , he was enjoined by order of this court [or, by order of J. K., Judge, etc.] from [here state act enjoined];

That the said [order; or, writ of] injunction was granted without notice to the defendant;

That the affiant has fully and fairly stated the case in this action to L. M., his counsel, who resides at . . . , [in said county], and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to this action, and to the whole thereof; and

That [here state the facts which furnish grounds for the modification or vacation of the injunction].

And affiant makes this affidavit for the purpose of moving that the said injunction be vacated [or, modified so as to permit and allow, stating what].

[JURAT.] C. D.

§ 3070. Notice of motion to vacate or modify injunction.

Form No. 807.

[TITLE.]

Please take notice, that on the defendant's answer and the affidavit of E. F., attached hereto, the undersigned will move the court, at a special term to be held at . . . , on the . . . day of . . . ,

19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, [or, will move before, [designating the judge who granted the order], at his office in the city of . . . on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon], that the injunction issued in this action be vacated [or, be modified so as to permit defendant to, etc.], with costs; and for such other or further relief as may be just.

Dated . . ., 19..

L. M., Defendant's Attorney.

[Address to plaintiff's attorney.]

§ 3071. Order dissolving injunction.

Form No. 808.

[TITLE.]

On reading and filing answer of defendant, and on motion of G. H., counsel for the defendant, and after hearing E. F., counsel for plaintiff, in opposition:

It is ordered, that the injunction granted on the . . . day of . . ., 19.., against the above-named C. D., be vacated and dissolved.

J. C., Judge of . . . County.

§ 3072. Order confirming report as to damages.

Form No. 809.

[TITLE.]

On reading and filing the annexed notice of motion and affidavit and certificate, and the referee's report, and the evidence on which the same was founded, and on motion of G. H. for the defendants, and after hearing E. F. for plaintiffs, and for L. M. and N. O. [sureties], in opposition:

It is ordered that the said report of the referee herein be and the same is hereby, in all respects, confirmed, with . . . dollars as costs of this motion.

§ 3073. Injunction dissolved and action dismissed.

Form No. 810.

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court upon the issues joined between

the parties; on consideration whereof the court does find that the said defendant [here state the finding of the court on the issues presented in the pleadings] was not guilty of the waste and destruction in manner and form as the said plaintiff hath in his said complaint declared against him, or in any manner, or at all.

It is, therefore, ordered that the injunction heretofore granted in this action be and the same is hereby dissolved; and it is further ordered that the said defendant recover against the said plaintiff his costs in and about his suit, in this behalf expended, taxed at . . . dollars.

[SIGNATURE OF JUDGE.]

§ 3074. Injunction made perpetual.

Form No. 811.

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court, upon the issues joined between the parties; on consideration whereof, the court finds that the said defendant was guilty of the waste and destruction, in manner and form as the said plaintiff hath in his said complaint alleged against him.

It is, therefore, ordered and adjudged, that the injunction heretofore granted in this action be and the same is hereby made perpetual, and the said defendant is hereby perpetually enjoined from [here state the act or acts complained of with particularity, from the doing of which the defendant is to be enjoined]; and it is further ordered that the said plaintiff recover against the said defendant his costs in and about his suit, in this behalf expended, taxed at . . . dollars.

[SIGNATURE OF JUDGE.]

CHAPTER LXXXIX.

RECEIVERS.

§ 3075. Nature of receivership.—A receiver is the hand of the court of which he is an officer. His appointment determines no rights, does not affect the title of the property in any way, and his holding is the holding of the court. A party upon whose application a receiver is appointed in a civil action has no greater interest in the proceeds of such receivership than he would have had if the receiver had been appointed upon the application of any other of the litigants in the action.[1] Where the principal question in dispute is legal, and not equitable, equity will not appoint a receiver to collect the rents.[2]

Courts of equity have no jurisdiction to appoint a receiver, except in an action pending in which the receiver is desired.[3] A party to an action should not against his will be subjected to the expenses of a receivership, unless such appointment is clearly necessary to protect the opposite party.[4] Courts of equity have the power to appoint receivers and to order them to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver.[5] But in an action by a tenant in common to recover from a cotenant an undivided interest in land, the court has no power to appoint a receiver over other lands of the defendant not involved in the suit.[6] A receiver may properly be appointed to take possession of books of account in which plaintiff and defendant are jointly interested.[7]

§ 3076. Receiver for corporation.—Under the code, a receiver will be appointed where it is shown that the corporation is insol-

1 Jackson v. King, 9 Kan. App. 160, 58 Pac. 1013.
2 Bennallack v. Richards, 125 Cal. 427, 58 Pac. 65.
3 People v. District Court, 33 Colo. 293, 80 Pac. 908.
4 DeLeonis v. Walsh, 148 Cal. 254, 82 Pac. 1047.
5 Ex parte Cohen, 5 Cal. 494.
6 Branner v. Webb, 10 Kan. App. 217, 63 Pac. 274.
7 Bauer v. Haggerty, 42 Wash. 313, 83 Pac. 871.

vent or in imminent danger of insolvency, and in all cases where receivers have heretofore been appointed by the usual custom of courts of equity.[8] On the appointment of a receiver of an insolvent building and loan association its business ceases.[9] The appointment of a receiver of a corporation at the suit of stockholders for the purpose of bringing actions on its behalf should be refused.[10] Where a corporation is not in active operation, and a large part of its property has been destroyed by fire, and the stockholders are divided into factions, a receiver may be appointed who may receive insurance money.[11]

When a suit is brought in good faith by an insolvent corporation in winding up its affairs, costs for which it thereby becomes liable should be paid as preferred claims. The corporation has power to commence an action after the appointment of a receiver and during a stay granted while a decision of the supreme court is being made.[12] Application of property of a corporation to the satisfaction of judgments against it, after a sale of the property by the corporation receiver had been set aside on appeal, is an application of the property to the benefit of the corporation.[13] Where a corporation was adjudged not to be the owner of certain property, it cannot complain of any order respecting the control of such property.[14]

In the absence of statutory authority, a receiver cannot be appointed during the pendency of an action to displace the management of a corporation by its directors.[15] In a case decided in December, 1878, by the supreme court of California,[15a] it was held that the general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against it by a private person; but such power, if it exists at all, must be derived from a statute conferring it upon the court, and that section 564 of the

8 Hall v. Nieukirk, 12 Idaho, 33, 118 Am. St. Rep. 188, 85 Pac. 485.

9 Monier v. Clark, 12 N. Mex. 118, 75 Pac. 35.

10 Hallenborg v. Cobre Grande Copper Co., 8 Ariz. 329, 74 Pac. 1052.

11 Gibbs v. Morgan, 9 Idaho, 100, 72 Pac. 733; Fernald v. Spokane etc. Tel. Co., 31 Wash. 672, 72 Pac. 462.

12 Boston etc. Cons. Min. Co. v. Montana Ore-Purchasing Co., 27 Mont. 431, 71 Pac. 471.

13 Lutey v. Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

14 La Junta etc. Canal Co. v. Hess, 31 Colo. 1, 71 Pac. 415.

15 Fischer v. Superior Court, 110 Cal. 129, 42 Pac. 561. Compare State v. District Court, 15 Mont. 324, 48 Am. St. Rep. 682, 39 Pac. 316, 27 L. R. A. 392.

15a La Société Française d'Epargnes etc. v. District Court, 53 Cal. 495.

Code of Civil Procedure does not confer it. It was further held that the effect of the appointment of a receiver in such case is to dissolve the corporation.[16]

§ 3077. Receiver for corporation — Continued. — A court of equity cannot appoint a receiver and decree a sale of the property and affairs of a corporation; for such a decree would necessarily result in a dissolution of the corporation.[17] And where the directors of a building and loan association, whose charter has expired, are winding up their business, as provided by the code, a receiver should not be appointed unless it appears that the parties complaining are about to be injured by the directors' unwarranted acts.[18] A creditor of an insolvent corporation may at any time while his claim is valid enforce it through a receivership.[19] A simple contract creditor whose claim is not controverted is entitled to the appointment of a receiver of a debtor corporation on mere showing of insolvency.[20]

Under subdivision 5 of section 564 of the California Code of Civil Procedure, a receiver may be appointed when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights. Where money is recovered in a suit by a part of the stockholders of a corporation for themselves and others, the money should be paid into court, to be distributed by the clerk.[21]

§ 3078. Appointment of the receiver.—In California, the code provides that a receiver may be appointed by the court in which the action is pending, or by a judge thereof—"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund

16 See Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. 388, cited in the above case.

17 Neall v. Hill, 16 Cal. 148, 76 Am. Dec. 508.

18 Ferrel v. Evans, 25 Mont. 444, 65 Pac. 714.

19 New York Nat. Exch. Bank v. Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905.

20 Davis v. Edwards, 41 Wash. 480, 84 Pac. 22.

21 Young v. Hughes, 39 Or. 586, 65 Pac. 987, 66 Pac. 272.

is in danger of being lost, removed, or materially injured; 2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt; 3. After judgment, to carry the judgment into effect; 4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment; 5. In cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity." [22]

In construing this provision of the California code, it has been held that subdivision 6 thereof is but declaratory of the equity jurisdiction conferred on the courts by the constitution, and includes only the suits in which it has been the usage of courts of equity to appoint a receiver; their jurisdiction in this respect would have been the same in the absence of the statute. It does not include the power to appoint a receiver in an action of ejectment, and an order making an appointment should be annulled;[23] nor does it embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person; such power must be derived from express statute. If a receiver is appointed in such suit, the appointment will be annulled on *certiorari*.[24] The appointment of a receiver may be made upon an *ex parte* application at chambers.[25]

Where the allegations of a bill are general, and the equities are fully denied, such a case is not presented as will justify the appointment of a receiver, and the withdrawal of the property from the hands of one intimately acquainted with all of the affairs of the concern, and placing it in the hands of another who may not be equally competent to manage the business.[26]

22 Cal. Code Civ. Proc., §§ 564-569; N. Y. Code Civ. Proc., § 713; Ohio Code, § 5587.

23 Bateman v. Superior Court, 54 Cal. 285; Scott v. Sierra Lumber Co., 67 Cal. 76, 7 Pac. 131.

24 La Société Française d'Epargnes etc. v. District Court, 53 Cal. 495.

25 Real Estate Assoc. v. Superior Court, 60 Cal. 223.

26 Williamson v. Monroe, 3 Cal. 383.

§ 3079. Grounds for appointment—To preserve property.—The court has no power to appoint a receiver of lands *pendente lite* in an action by one not entitled to their possession, and involving only legal rights.[27] A showing that there is imminent danger that property in the possession of defendant will be removed beyond the jurisdiction of the court and unlawfully disposed of is sufficient to give the court jurisdiction to appoint a receiver without notice of the application.[28]

A party claiming title to a mining property under a lease, and in possession thereof, may not from those facts alone have a receiver appointed, over the objection of another party who claims title to the mine.[29] Mere colorable ouster on the part of a tenant in common who is in possession of a mining claim by the consent of a cotenant who has brought a suit for partition, and the mere fact that the care of the property involves considerable expense, will not authorize the appointment of a receiver pending the final hearing of the suit.[30] A lessor for money rent, reserving no lien upon the crops or right of re-entry, cannot have a receiver appointed to irrigate and save the crop of his insolvent lessee.[30a]

In the foreclosure of a chattel mortgage a receiver may be appointed without notice, if sufficient emergency is made to appear;[31] but a court of equity will not appoint a receiver of real estate, as against the party in possession asserting title, unless it is shown to be in danger of great waste or irreparable injury.[32] A mortgagee in possession may be divested of possession by appointment of a receiver, when he is irresponsible and there is danger of loss.[33] However, in an action to compel the transfer of real property, where defendants are numerous, and some of them are minors, a receiver may be appointed to take the legal title of the property and make the conveyance.[34] Where part of the stockholders of a corporation have recovered money to which

27 San Jose Safe-Deposit Bank v. Bank of Madera, 121 Cal. 543; 54 Pac. 85.

28 State v. District Court, 22 Mont. 241, 56 Pac. 281.

29 Hickey v. Parrot etc. Co., 25 Mont. 164, 64 Pac. 330.

30 Heinze v. Kleinschmidt, 25 Mont. 89, 63 Pac. 927.

30a Title Ins. & Tr. Co. v. Greder, 152 Cal. 746, 94 Pac. 601.

31 Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711.

32 Kelly v. Steele, 9 Idaho, 141, 72 Pac. 887.

33 Harding v. Garber, 20 Okla. 11, 93 Pac. 539.

34 Scadden Flat Gold Min. Co. v. Scadden, 121 Cal. 33, 53 Pac. 440.

all are entitled, it should be paid into court and distributed by the clerk, and not by a receiver.[35]

A receiver may be appointed in a partition suit in proper cases.[36] A receiver will not be appointed for business in the hands of a defendant, unless the plaintiff's right is sufficiently probable, or it is probable that such property will be lost or injured or the business mismanaged.[37] In supplementary proceedings, after return of execution unsatisfied, an order requiring defendant to pay the amount of the judgment from a sum to be collected by her on a chose in action is erroneous; for the court should have appointed a receiver to collect the order and make the application.[38]

Where the mortgagor of a vessel fails to insure it, as agreed, there being no fire-insurance company that will take the risk, and he plies his boat in interstate commerce, such failure to insure and such removal of the boat beyond the jurisdiction of the state are not grounds for the appointment of a receiver.[39]

§ 3080. Jurisdiction to appoint.—The court which first acquires jurisdiction and appoints a receiver of a fund has the whole jurisdiction thereof, and is bound to administer it.[40] The supreme court has power to appoint a receiver pending the litigation;[41] but a probate court has no such chancery powers.[42] Where a suit is brought in the federal court to cancel a lease against an assignee alone, it is immaterial that the property is in the hands of a receiver of the state court, and that the leave is not had to sue. Also, an order directing a receiver of a state court to turn over the property to a United States marshal holding a writ of assistance, pending an appeal in which a *supersedeas* had been filed, is no abuse of discretion.[43]

§ 3081. Application and notice of appointment. — The appointment of a receiver before the commencement of an action is

35 Young v. Hughes, 39 Or. 586, 65 Pac. 987, 66 Pac. 272.

36 Mesnager v. DeLeonis, 140 Cal. 402, 73 Pac. 1052.

37 City of Ogden v. Bear Lake etc. Waterworks etc. Co., 16 Utah, 440, 52 Pac. 697, 41 L. R. A. 305.

38 In re Downey, 31 Mont. 441, 78 Pac. 772.

39 Eureka Min. etc. Co. v. Lewiston Nav. Co., 12 Idaho, 472, 86 Pac. 49.

40 O'Mahoney v. Belmont, 62 N. Y. 133.

41 Chemung Min. Co. v. Hanley, 11 Idaho, 302, 81 Pac. 619.

42 Garrett v. London etc. Fire Ins. Co., 15 Okla. 222, 81 Pac. 421.

43 Isom v. Rex Crude Oil Co., 147 Cal. 663, 82 Pac. 319.

void, and an agreement between the judge and attorney does not make an order valid which was void because made before the commencement of the action.[44]

Where a receiver was appointed to take charge of a fruit crop, standing and growing on mortgaged premises described in the complaint, and the complaint failed to describe such premises with sufficient exactness to warrant a lien or justify an order of sale, the order of appointment must be reversed, since there was no *res* of which possession could be taken.[45] An *ex parte* order appointing a receiver in an action, where made after the appearance of a defendant, is void.[46] But the fact that the complaint stating the cause of action is defective is no ground for refusing to appoint a temporary receiver.[47] The burden is upon the applicant for a receiver to show that a receiver is necessary and proper, and a mere complaint, verified on information and belief, is insufficient.[48] Nor, on the other hand, do affidavits denying all the equities of a complaint amount to a *prima facie* case in favor of defendants on the hearing of an application for a temporary receiver based on the complaint, where they are not full and responsive to all its material allegations, or do not contain more than a general denial.[49]

Service of an amended complaint and four days' notice on the attorney for defendant, who appeared and filed a demurrer, is sufficient; and where the motion was for the appointment of a temporary receiver, and the order does not state that the appointment is temporary, the effect of the order is only temporary.[50]

§ 3082. Ex parte application and undertaking.—If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment and entry upon his duties of such receiver, in case it shall have been

44 Popp v. Daisy Gold Min. Co., 27 Utah, 83, 74 Pac. 426.

45 Salisbury v. Wilcox, 128 Cal. 347, 60 Pac. 979.

46 Cummings v. Steele, 6 Idaho, 666, 59 Pac. 15.

47 Belding v. Washington Cornice Co., 36 Wash. 549, 79 Pac. 37.

48 Benepe Owenhouse Co. v. Scheidegger, 32 Mont. 424, 80 Pac. 1024.

49 Cameron v. Groveland Imp. Co., 20 Wash. 169, 79 Am. St. Rep. 26, 54 Pac. 1128.

50 Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711.

procured wrongfully, maliciously, or without sufficient cause; and the court may in its discretion, at any time, require an additional undertaking.[51]

§ 3083. Invalid appointments.—In case of jurisdiction of the parties and subject-matter, the appointment of a receiver cannot be inquired into in collateral proceedings.[52] The objection to a receiver must be made before judgment in an action in which the complainant has participated.[53] Where the appointment of a receiver is void for want of jurisdiction, the court has no authority to direct a third person, not a party to the proceedings, to pay over to the receiver moneys which the receiver has deposited with him.[54]

The orders of a court purporting to vest a receiver with the control of the property and funds not involved in the litigation are void, and can be collaterally attacked at any time by any one, in any proceedings where their validity is in issue, but, if not absolutely void, they are not open to collateral attack.[55] An order continuing a receiver appointed *ex parte* is in effect an order appointing a receiver, and is appealable.[56] But a receiver is not entitled to appeal from an order removing him from his receivership.[57]

§ 3084. Discretion of the court.—A refusal to appoint a receiver in an action for dissolution of a partnership is a matter of sound discretion.[58] The appointment of a receiver in foreclosure by the superior court, pending receivership under an order of the superior court of another county, is erroneous.[59] An order of the supreme court staying proceedings, under an order appointing a receiver, requires the return of the property.[60]

The appointment of a receiver rests in the sound discretion of the court upon a view of all the facts, one of which is that the

51 Cal. Code Civ. Proc., § 566.

52 Powell v. National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Carroll v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32.

53 Pitts v. New Mammoth Gold Min. Co., 23 Utah, 623, 65 Pac. 1076.

54 State v. District Court, 21 Mont. 155, 69 Am. St. Rep. 645, 53 Pac. 272.

55 Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589.

56 State v. Superior Court, 34 Wash. 123, 74 Pac. 1070.

57 State v. Interstate Fisheries Co., 36 Wash. 80, 78 Pac. 202.

58 Silveira v. Reese, 138 Cal. xix, 71 Pac. 515.

59 Fernald v. Spokane etc. Tel. Co., 31 Wash. 219, 71 Pac. 731.

60 Rumney v. Donovan, 28 Mont. 69, 72 Pac. 305.

party asking the appointment should make out a *prima facie* case; and after an *ex parte* appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing.[61]

§ 3085. Appointment pending litigation.—When either party establishes a *prima facie* right to the property, or to an interest in the property, the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired, the court, or a judge thereof, may appoint a receiver.[62] In a foreclosure suit, the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending a litigation;[63] unless it appears that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.[64]

§ 3086. Appointment after judgment.—In an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. If the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed pending further litigation, on motion for a new trial and appeal.[65]

§ 3087. Appointment to take charge of mining claims.—The purchaser of a mining claim at judicial sale, where the judgment debtor remains in possession, working the claim, and is insolvent, has a right to have a receiver appointed to take charge of the proceeds during the period allowed by the statute for redemption.[66]

61 Copper Hill Min. Co. v. Spencer, 25 Cal. 15. See Wilson v. Davis, 1 Mont. 98; Watkins v. National Bank, 51 Kan. 254, 32 Pac. 914.

62 Cal. Code Civ. Proc., § 564.

63 Guy v. Ide, 6 Cal. 101, 65 Am. Dec. 490; Meyer v. Seebald, 11 Abb. Pr. (N. S.) 326, note.

64 La Société Française d'Epargnes etc. v. Selheimer, 57 Cal. 623. Compare Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, 33 Pac. 550; Staples v. May, 87 Cal. 178, 25 Pac. 346.

65 Whitney v. Buckman, 26 Cal. 447. See Cal. Code Civ. Proc., § 564.

66 Hill v. Taylor, 22 Cal. 191.

§ 3088. **Appointment in injunction suit.**—If notice is given of an application for an injunction, and the petition prays for an injunction, the judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver, and no objection is made on the ground of want of notice of the application.[67]

§ 3089. **Duration of receivership.**—A receiver appointed pending an action for attorney's fees is discharged on judgment for defendant, without waiting for the outcome of the appeal.[68] An order continuing a receiver appointed *ex parte* is in effect an order appointing a receiver, and is appealable.[69] A receivership should terminate when the cause is determined and the accounts settled.[70] The trial of the cause on its merits is not stayed pending an appeal from an order appointing a receiver.[71]

Where the plaintiff has recovered judgment in an action against her cotenant for her undivided interest in the land, and for her share of the rents, and her interest has been discharged from the custody of the receiver, and she is put in possession thereof, and execution has been levied on other property of the defendant sufficient to cover the judgment, it is error to refuse to discharge defendant's share of the property on motion.[72]

§ 3090. **Vacating order of appointment.**—The pendency of a motion for a new trial does not operate as a stay of proceedings so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.[73] The court which first acquires jurisdiction and appoints a receiver of a fund has the whole jurisdiction thereof, and is bound to administer it.[74]

§ 3091. **Who disqualified to act as receiver.**—No party, or attorney of a party, or person interested in an action, or related

67 Whitney v. Buckman, 26 Cal. 447. Compare Walker v. Stone, 70 Iowa, 103, 30 N. W. 39; Stockton v. Central R. R. Co., 50 N. J. Eq. 489, 25 Atl. 942.

68 Harris v. Root, 28 Mont. 159, 72 Pac. 429.

69 State v. Superior Court, 34 Wash. 123, 74 Pac. 1070.

70 State v. Superior Court, 31 Wash. 481, 71 Pac. 1095.

71 State v. Bell, 36 Wash. 196, 78 Pac. 908.

72 Branner v. Webb, 10 Kan. App. 217, 63 Pac. 274.

73 Copper Hill Min. Co. v. Spencer, 25 Cal. 15; Wilson v. Barney, 5 Hun, 257.

74 O'Mahoney v. Belmont, 62 N. Y. 183.

to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties filed with the clerk.[75]

§ 3092. Oath and bond of the receiver.—Before entering upon his duties, the receiver must be sworn to perform them faithfully, and must execute an undertaking to the state of California, in such sum as the court or a judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein.[76] An emergency order appointing a receiver without requiring bond is void.[77]

§ 3093. Powers, duties, and liabilities of receiver.—In California, the code provides that the receiver has, under the control of the court, power to bring and defend actions in his own name as receiver; to take and keep possession of the property; to receive rents, collect debts, and to compound for and compromise the same; to make transfers; and generally to do such acts respecting the property as the courts may authorize.[78] The Ohio code contains the same provisions.[79] A receiver may employ counsel.[80]

The receiver is not an agent of any party, but an officer of the court appointing him, and with only such powers as are conferred on him by the appointment; and persons who furnish supplies to or perform labor for a receiver are presumed to know whether he possesses the powers which he assumes to exercise.[81] A receiver can pay out nothing except on an order of the court; but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity.[82] It will not be presumed that the receiver has transcended his duties, and taken possession of property to which he has not been entitled; nor is the opposite party entitled to have issues framed and submitted to a

75 Cal. Code Civ. Proc., § 566, as amended 1907.

76 Cal. Code Civ. Proc., § 567.

77 Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

78 Cal. Code Civ. Proc., § 568. See, also, Dennery v. Superior Court, 84 Cal. 7, 24 Pac. 147; Pacific Railway Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201, 27 Pac. 768, 13 L. R. A. 754.

79 Ohio Code, § 5590.

80 Adams v. Woods, 8 Cal. 315.

81 Hendrie & Bolthoff Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113.

82 Adams v. Woods, 8 Cal. 315, 15 Cal. 207; Adams v. Haskell, 6 Cal. 475.

referee or jury to ascertain the ownership of the money in the receiver's hands.[83]

A receiver is personally liable to persons sustaining loss or injury by or through his own neglect or misconduct; but for the neglect or misconduct of those employed by him in performance of the duties of his trust, he is liable only in his official capacity, and the judgment against him, if any, must be made payable out of the funds in his own hands as receiver.[84] In this case it was held, that where a railroad was operated by a receiver, a party injured, might, by leave of the court appointing the receiver, maintain an action against him as such for injuries sustained, and that it was no defense in such action that the receiver was a public officer, or that he was an agent or trustee.

§ 3094. **Receiver's title to and possession of property.**—The receiver's title and right vests from the original order for appointment, and is subject only to the equities and incumbrances existing prior thereto.[85] After property passes into the hands of a receiver no lien can be obtained against it by any action that claimants may take; but receivers take property subject to all valid liens existing against it, such as a judgment lien.[86] A lien cannot be obtained on the assets of an insolvent partnership in the hands of a receiver superior to the claims of creditors who have intervened in such action, by taking judgment and filing a creditor's bill.[87] An order reinstating an order for the appointment of a receiver relates back to the date of the appointment, and takes precedence of a chattel mortgage given since the first order.[88] An insolvent, after the appointment of a receiver, cannot subject the funds in the hands of a receiver to any legal liability.[89] The right to possession of property of a corporation, as between attaching creditors and a receiver, may depend upon the solvency of the corporation.[90] When a receiver has been appointed, he has the sole right of bringing ac-

83 Whitney v. Buckman, 26 Cal. 451.

84 Camp v. Barney, 4 Hun, 373. See, also, Miller v. Loeb, 64 Barb. 454; Potter v. Bunnell, 20 Ohio St. 151; Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

85 Ardmore Nat. Bank v. Briggs Machinery etc. Co., 20 Okla. 427, 94 Pac. 533.

86 Cramer v. Iler, 63 Kan. 579, 66 Pac. 617.

87 Foster v. Field, 13 Okla. 230, 74 Pac. 190.

88 Powell v. National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536.

89 Ford v. Gilbert, 44 Or. 259, 75 Pac. 138.

90 State v. Superior Court, 36 Wash. 91, 78 Pac. 461.

tions in regard to the property in question, and any suit brought by the insolvent owner will be dismissed on motion.[91]

§ 3095. Administration.—Receivers, or other custodians of money in the hands of a court, as they are bound to obey orders of the court in their relation to the fund, as well regarding its safe custody as its return, are correlatively entitled to the protection of the court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending.[92]

Where the court had jurisdiction to appoint a receiver, error in making the appointment, or in not controlling the receiver's conduct, is not ground for intervention.[93] Parties who have secured the appointment of a receiver, and acquiesced in his operation of the mine under the lease, are liable to the receiver for the loss at which the mine is run.[94] A receiver is not chargeable with the use of an opera-house on occasions when he had donated it for charitable and social purposes, where he received nothing for its use, and it is not shown that he would have received anything, or that the property would have been used on such occasions by other persons, and where it is customary for ordinarily prudent owners of like property to donate the use of such opera-house for like purposes.[95]

§ 3096. Administration—Completing contracts.—As the representative of creditors, the receiver of an insolvent corporation may disaffirm acts of the corporation, and sue to set aside transfers of the corporate property made in fraud of their rights.[96] While a receiver of an irrigation company is not bound to perform its contracts to supply water, yet demand on him is proper, as performance, if possible, might accrue to the interest of the creditors.[97] One contracting with a receiver, with the approval of the court, subjects himself to the jurisdiction of the court.[98]

91 Boston etc. Cons. etc. Min. Co. v. Montana Ore-Purchasing Co., 24 Mont. 142; 60 Pac. 990.

92 Adams v. Haskell, 6 Cal. 475; Guardian Sav. Inst. v. Bowling Green S. I., 65 Barb. 275.

93 Isaacs v. Jones, 121 Cal. 257, 53 Pac. 793, 1101.

94 Welch v. Renshaw, 14 Colo. App. 526, 59 Pac. 967.

95 McKennon v. Pentecost, 8 Okla. 117, 56 Pac. 958.

96 Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

97 Russ Lumber etc. Co. v. Muscupiabe Land etc. Co., 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

98 Pacific Lumber Co. v. Prescott, 40 Or. 374, 67 Pac. 207.

§ 3097. **Administration—Accepting a lease.**—Where a corporation, after commencing an action of conversion, went into the hands of a receiver, the acceptance of money by such receiver, paid on an alleged lease with the corporation, does not amount to a ratification of the lease, the receiver being ignorant of the material facts surrounding the same.[99]

§ 3098. **Administration—Making improvements.**—An application of a receiver for permission to build a mile of track may be refused as not necessary.[100] An order directing the receiver of a mining company to purchase machinery, made on his application, and without notice, is within the court's jurisdiction.[101] A receiver of a hospital corporation cannot create debts in the operation or improvement of the hospital which will take precedence of prior mortgage liens, and the court cannot give the receiver any such authority.[102]

§ 3099. **Administration—Hiring help.**—The receiver of a corporation has no authority to carry on the business unless so directed by the court.[103] Wages paid the superintendent of a plant being operated under a receivership are proper.[104] But where the president of a corporation in the hands of a receiver assists the receiver with services and advice in the superintending of the trust property, an action at law against the receiver as such, by such president, will not lie for the services rendered, as it was the duty of the receiver himself to perform them.[105] A receiver is entitled to the benefit of counsel when necessary; and while he usually selects his own counsel, he cannot make any binding contract for their compensation.[106]

§ 3100. **Receiver's certificates.**—One receiver's certificate may be a prior lien as against another, and it is permissible to allow a purchaser at a receiver's sale to turn in on the purchase price

99 Groveland Imp. Co. v. Farmers' Supply Co., 25 Wash. 344, 87 Am. St. Rep. 755, 65 Pac. 529.

100 Pueblo Traction etc. Co. v. Allison, 30 Colo. 337, 70 Pac. 424.

101 Free Gold Min. Co. v. Spiers, 136 Cal. 484, 69 Pac. 143.

102 United States Investment Co. v. Portland Hospital, 40 Or. 523, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627.

103 Dalliba v. Winschell, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

104 Oudin etc. Co. v. Cole, 35 Wash. 647, 77 Pac. 1066.

105 Joost v. Bennett, 123 Cal. 424, 56 Pac. 43.

106 Hickey v. Parrot Silver etc. Co., 32 Mont. 143, 108 Am. St. Rep. 510, 79 Pac. 698.

a receiver's certificate which is a prior lien.[107] A receiver appointed by the court for collection and enforcement of the liabilities of stockholders of an insolvent corporation for its debts is a "duly authorized" agent of the creditors to prove their debts against an estate of a bankrupt stockholder.[108] A receiver's certificates, issued to carry on the business of the concern, cannot be made prior liens to an existing mortgage without the consent, express or implied, of the mortgagee.[109]

§ 3101. **Ratification of receiver's acts.**—The court's approval of the receiver's report may ratify and make valid a sale otherwise invalid.[110] The paying of certain bills may be sanctioned by a subsequent order of the court.[111]

§ 3102. **Authority to sell property.**—Under the statutes in regard to receivers, the judge at chambers may grant the application of a receiver to sell property, with instructions to report the sale to the court for confirmation.[112] The statute in relation to notice to be given in case of sale under execution does not govern in case of a receiver's sale; and if the court orders that certain notice be given, that notice is sufficient, and the court may appoint an agent to conduct the sale in absence of the receiver. and such sale will be confirmed without requiring such agent to take oath or give bond, unless so directed by the order appointing him.[113]

§ 3103. **Contest of receiver's sale.**—A purchaser at a receiver's sale who was himself a party to the action is estopped from questioning collaterally the regularity of the appointment of the receiver or of an agent to sell the real estate.[114] The disposition of funds by a sale by a receiver whose appointment was set aside are not subject to determination in a litigation to which the debtor was not a party.[115] If the receiver has no power to convey land

107 Nisbet v. Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

108 Dight v. Chapman, 44 Or. 265, 75 Pac. 585, 65 L. R. A. 793.

109 International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621.

110 Tobin v. Portland Flouring Mills, 41 Or. 269, 68 Pac. 743, 1108.

111 Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

112 First Nat. Bank v. Bunting & Co., 7 Idaho, 387, 63 Pac. 694.

113 Threadgill v. Colcord, 16 Okla. 447, 85 Pac. 703.

114 Id.

115 Lutey v. Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

belonging to the estate, pursuant to the contract of sale, the purchaser may recover the amount paid on the execution thereof.[116] The purchaser of property from a receiver takes it subject to the rule of *caveat emptor*.[117]

§ 3104. **Allowance of claims—Taxes.**—A court is authorized to ascertain the amount of taxes, and direct that it be paid by the receiver.[118] The interest and penalties accrued on delinquent taxes on real estate of a national bank are as much a legal claim of the state as are the taxes; and orders for the distribution of assets in the hands of a receiver should be made in subordination to the paramount right of the state to such taxes, penalties, and interest.[119]

§ 3105. **Priority of debts.**—A judgment creditor of a receiver of a partnership is entitled to payment of his judgment without waiting final settlement of the receivership's accounts; for it is payable out of any funds in the receiver's hands, but can be enforced only by order of court requiring payment.[120] A receiver can take no greater right with reference to certain mortgaged chattels, as against the mortgagees, than any other third party interested in the property.[121]

When a suit is brought in good faith by an insolvent corporation in winding up its affairs, costs for which it thereby becomes liable should be paid as preferred claims.[122] Equity has power to appoint receivers and direct them to protect the property, and decree expenses therefor as prior liens, but not in case of a receiver for a placer mine which does not need to be worked.[123] Employees of a corporation in the hands of a receiver are not entitled to priority of payment as against mortgagees of the corporation.[124] Where an insolvent has money in

116 Bidwell v. Rice, 19 Wash. 146, 52 Pac. 1019.

117 Fall etc. Fish Co. v. Point Roberts Fishing etc. Co., 24 Wash. 630, 64 Pac. 792.

118 Los Angeles v. Los Angeles City Water Co., 137 Cal. 699, 70 Pac. 770.

119 United States Nat. Bank v. Logan Co. (Okla.), 51 Pac. 97; Gray v. Logan County, 7 Okla. 321, 54 Pac. 485.

120 Painter v. Painter, 138 Cal. 231, 71 Pac. 90, 94 Am. St. Rep. 47.

121 Kidder v. Beaver, 33 Wash. 635, 74 Pac. 819.

122 Boston etc. Cons. Min. Co. v. Montana Ore-Purchasing Co., 27 Mont. 431, 71 Pac. 471.

123 Dalliba v. Winschell, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

124 Security Savings etc. Co. v. Goble etc. Co., 44 Or. 370, 74 Pac. 919, 75 Pac. 697.

a bank subject to check, and owes that bank on a note, on his being adjudged a bankrupt, the bank may have the deposit set off against the note and prove its claim for the balance.[125]

Only in the case of a quasi-public corporation going into the hands of a receiver, is it proper to make a receiver's certificates, issued to carry on the business liens prior to existing mortgage liens.[126] The right of a court appointing a receiver for a corporation to give priority of payment to unsecured debts over the lien of first-mortgage bonds is restricted to railroads, which are public concerns, and cannot be exercised to give unsecured creditors of an ordinary corporation such preference over contract liens.[127] By express provision, laborers are entitled to prior liens upon property of a corporation in the hands of a receiver.[128]

§ 3106. Payment of debts.—Where there is one receiver of three separate funds, arising from the property of an individual, a firm of which he was a member, and the community estate of himself and wife, any and all of such funds are liable for expenses of the receivership; but rents collected off the community property should not be applied to a claim allowed against the individual property as a lien, since the specific lien on the realty created by the receivership decree, marshaling the assets and directing distribution, attached to the proceeds of such realty.[129]

An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership;[130] and this, although the claim is for disbursements incurred by the custodian of the fund under an appointment as assignee in a proceeding in insolvency which was afterwards held to be void.[131]

125 West v. Bank of Lahoma, 16 Okla. 328, 85 Pac. 469.

126 International Trust Co. v. United Coal Co., 27 Colo. 246, 83 Am. St. Rep. 59, 60 Pac. 621; Lamar Land etc. Co. v. Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210.

127 Merriam v. Victory Min. Co., 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

128 Nisbet v. Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15. See Cal. Code Civ. Proc., § 1204.

129 Cannon v. Snipes, 32 Wash. 243, 73 Pac. 379, 24 Wash. 166, 64 Pac. 167.

130 Adams v. Haskell, 6 Cal. 475.

131 O'Mahoney v. Belmont, 62 N. Y. 133.

§ 3107. Leave to sue and be sued.—Unless expressly authorized by the statute under which the appointment is made, a receiver cannot sue or be sued without leave of court.[132] And it has been held that the power to collect is not sufficient to authorize him to sue;[133] but if permission is once given to make him a party, other parties may file cross-bills against the receiver without securing further permission.[134] Notice of the application to the court appointing for leave to sue the receiver need not be given to him, nor to the parties to the action in which he was appointed.[135] Where leave to sue or be sued is required to be obtained, that the same was obtained should be alleged in the complaint. Even if this allegation is not held necessary by the courts in some of the states, the safer practice is to make it.[136] An application for leave to sue the receiver of an insolvent corporation is addressed to the sound discretion of the court, and an order denying such application will be upheld unless it is made to appear that the discretion thus vested in the court has been abused.[137]

A complaint in an action by a receiver is not subject to general demurrer, and it need not allege that the receiver has leave to bring the action.[138] A failure to obtain leave to sue a receiver is a mere irregularity which can only be taken advantage of by stay of proceedings or by proceedings in contempt; but when the action is brought in the court in which the receiver has been appointed, the consent of the court is presumed.[139] The order denying right to sue a receiver is appealable, and cannot be reviewed by *certiorari*.[140] Where neither a corporation owner of mortgaged chattels nor its receiver had ever had possession of the property, it was not necessary for the mortgagee to get permission before beginning foreclosure suit.[141]

132 King v. Cutts, 24 Wis. 627; Battle v. Davis, 66 N. C. 252; Screven v. Clark, 48 Ga. 41; Cal. Code Civ. Proc., § 458; Brown v. Rauch, 1 Wash. 497, 20 Pac. 785; Martin v. Atchison, 2 Idaho, 624, 33 Pac. 47.

133 Screven v. Clark, 48 Ga. 41; King v. Cutts, 24 Wis. 627.

134 Venner v. Denver Union Water Co., 40 Colo. 212, 122 Am. St. Rep. 1036, 90 Pac. 623.

135 Potter v. Bunnel, 20 Ohio St. 150.

136 St. Louis etc. Ry. Co. v. Hamilton, 158 Ill. 366, 41 N. E. 777. Contra: Finch v. Carpenter, 5 Abb. Pr. 225. Compare Cal. Code Civ. Proc., § 568.

137 Meeker v. Sprague, 5 Wash. 242, 31 Pac. 628.

138 Allen v. Baxter, 42 Wash. 434, 85 Pac. 26.

139 Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429.

140 State v. Superior Court, 38 Wash. 23, 80 Pac. 195.

141 Kidder v. Beaver, 33 Wash. 635, 74 Pac. 819.

If a receiver appeals from an order or judgment made in the action in which he is appointed, without permission of the court appointing him, when he has no personal interest in such order, the appeal should be dismissed at his personal cost.[142] An order of court, obtained *ex parte*, and without notice to the interested parties, authorizing a suit against a receiver, does not preclude a court from dismissing such suit on the ground that plaintiff has mistaken his remedy.[143] Where the statute authorizes suits in respect to any acts of the receiver in carrying on the business without permission of court, such permission need not be had to bring action for failure to put a street in a safe condition, though it was excavated and defectively filled in before the receiver was appointed for the company.[144] Though the property is in the hands of a receiver, the mortgagee need not have the permission of the court to sue if his suit, and the decree itself, do not injure the rights of the receiver or the parties in the action in which the receiver was appointed.[145]

§ 3108. **Alleging appointment.**—A receiver suing by virtue of his title and authority should state the time and place of his appointment, and distinctly aver that he has been appointed by an order of the court.[146] Where a receiver would make title to a chose in action, he must set forth the facts showing his appointment; it will not be sufficient to aver that he was duly appointed.[147] So describing himself as "having been duly appointed receiver of, etc., and bringing this suit by order of the supreme court," is insufficient on demurrer.[148]

Where a plaintiff claims title to a note sued on by virtue of his appointment as receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed receiver.[149] The receiver should set forth in his complaint the facts of his ap-

142 First Nat. Bank v. Bunting & Co., 7 Idaho, 27, 59 Pac. 929, and 1106.

143 Goodnough v. Gatch, 37 Or. 5, 60 Pac. 383.

144 Robinson v. Mills, 25 Mont. 391, 65 Pac. 114.

145 Murray v. Etchepare, 132 Cal. 286, 64 Pac. 282.

146 White v. Low, 7 Barb. 204; Dayton v. Connah, 18 How. Pr. 326.

147 Gillet v. Fairchild, 4 Denio, 80; White v. Joy, 13 N. Y. 86.

148 Id.

149 Hyatt v. McMahon, 25 Barb. 457.

pointment and qualification in a traversable form; but it is held sufficient if these facts be stated in general terms.[150] In some cases, a receiver may sue in his own name, and without averring his appointment.[151]

§ 3109. **Parties.**—The receiver of an insolvent corporation, the property of which has been fraudulently divided among its stockholders, is the proper party to sue such stockholders for the creditors' benefit.[152] A judgment creditor of an insolvent corporation, after the return of a judgment unsatisfied, is entitled to the appointment of a receiver.[153] A corporation which has passed into the hands of a receiver cannot join with the receiver in an action to recover money alleged to be due the receiver.[154] The directors of an insolvent bank, who are managing its affairs as trustees, are proper parties defendant in a suit by a receiver appointed in an action brought by such trustees in the name of the bank, where the receiver sues for his compensation and expenses, and to have the same declared a preferred claim.[155]

§ 3110. **Actions against receivers.**—The receiver of a water company which has negligently filled in a street is liable for an injury resulting from his failure to use the highest degree of care to put the street in a safe condition.[156] The surviving partner of a firm, and creditors thereof, are not necessary parties to a suit against the receiver on a contract made by him, nor to an application to enforce a judgment. The receiver himself cannot plead error of the court in making his appointment.[157] Where the property of a railroad is in the exclusive control and possession of a receiver, it is not liable for personal injuries sustained by employees of such receiver.[158] An action for the death of a

150 Wason v. Frank, 7 Colo. App. 541, 44 Pac. 378; Rockwell v. Merwin, 45 N. Y. 166.

151 White v. Joy, 13 N. Y. 83; Bank of Niagara v. Johnson, 8 Wend. 645; Haxtun v. Bishop, 3 Wend. 13. Of the proper mode of complaining in an action by a receiver, of departure from the complaint in the reply, and of the proper mode of seeking relief where the reply departs from the complaint, see White v. Joy, 13 N. Y. 83; reversing 11 How. Pr. 36.

152 Consolidated Barbwire Co. v. Stevenson, 71 Kan. 64, 79 Pac. 1085.

153 Id.

154 Idaho Gold Reduction Co. v. Croghan, 6 Idaho, 471, 56 Pac. 164.

155 Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177.

156 Robinson v. Mills, 25 Mont. 391, 65 Pac. 114.

157 Painter v. Painter, 138 Cal. 231, 94 Am. St. Rep. 47, 71 Pac. 90.

158 St. Louis etc. Ry. Co. v. Bricker, 65 Kan. 321, 69 Pac. 328.

passenger while the railroad is being operated by a receiver is maintainable against the receiver.[159]

Where a contract liability was incurred by a copartnership long before the appointment of a receiver of the partnership assets, the partners are necessary parties to a suit on the contract, and a complaint against the receiver alone is demurrable.[160] Want of a formal order extending the receivership to a second suit, in which judgment for sale of property is rendered, does not invalidate such judgment.[161]

A suit cannot be brought against a receiver when the judgment would disturb the receiver's possession of the property; nor can a creditor bring an action against him to litigate his claim. All such questions may be determined by the court, by an intervention in the pending litigation.[162]

§ 3111. **Defenses.**—Since the code authorizes receivership for other things than insolvency, a complaint on a note by the payee's receiver must allege the insolvency; for a defense good against the payee is good against the receiver.[163] Though the liability of a receiver is official, and not personal, a mere averment that the property and funds of the receivership have passed out of his possession and beyond his control is not a good defense in an action against him for personal injuries alleged to have been negligently inflicted.[164]

§ 3112. **Assignment to a receiver.**—In California, the transfer to a receiver, by order of court, of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decision of the supreme court, but only void against the claim of creditors.[165] Where it appears that the partners, parties to the suit for a dissolution, held a judgment against a third party which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an

159 Denver etc. R. R. Co. v. Gunning, 33 Colo. 280, 80 Pac. 727.

160 Flynn v. Furth, 25 Wash. 105, 64 Pac. 904.

161 Gila Bend Reservoir etc. Co. v. Gila Water Co., 9 Ariz. 57, 76 Pac. 990.

162 Spinning v. Ohio Life Ins. etc. Co., 2 Dis. (Ohio) 336.

163 Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540.

164 Erb v. Popritz, 59 Kan. 264, 68 Am. St. Rep. 362, 52 Pac. 871.

165 Naglee v. Lyman, 14 Cal. 450.

assignment or transfer of any property not so reduced to possession within a reasonable time.[166]

§ 3113. Pleadings.—A complaint in an action by a judgment creditor asking for the appointment of a receiver for an insolvent corporation is not open to the objection that it fails to allege that the judgment debtor has no other property out of which the plaintiff could satisfy his judgment, when it states that the defendant is in failing circumstances, and that it has more judgments already rendered against it than it can pay.[167]

Where a complaint alleges that the business of a railroad company was controlled and managed by a receiver at the time a contract was entered into with the plaintiff, a contention on demurrer to the complaint that the receiver had no power to make the contract is without merit, the want of authority not appearing. It cannot be assumed that the contract was made in violation of his authority until his authority in the premises is shown.[168]

A receiver, in general, is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain; and he must show a cause of action existing in those parties.[169] Where the receiver brings an action to set aside an assignment, he must state in his complaint the equity of the party whose rights he represents, to maintain the action which he attempts to prosecute.[170] In an action by the receiver of an insolvent bank against its officers to recover damages for losses occasioned by alleged illegal loans, a mere allegation that they made illegal loans will not show a cause of action against the officers, but it is essential to allege the non-payment of the loans in question, from which the damage to the plaintiff may be inferred.[171]

§ 3114. Complaint—Funds in hands of trustees—Supplementary proceedings.—Where a complaint by a receiver appointed in supplementary proceedings alleged that a fund was given by will to the defendants, as trustees, in trust, to keep the same invested

166 Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491.

167 Whitehouse v. Point Defiance etc. Railway Co., 9 Wash. 558, 38 Pac. 152.

168 Bayles v. Kansas Pacific Ry. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480.

169 Coope v. Bowles, 42 Barb. 87, 18 Abb. Pr. 442, 28 How. Pr. 10.

170 Id.

171 Knapp v. Roche, 94 N. Y. 329.

and pay the interest to the execution debtor during his life, and that the defendants had collected interest since the appointment of the plaintiff as receiver, and refused to pay the same over to the plaintiff, but such complaint did not aver that any part of the interest was in the hands of the defendants, as a surplus above what was necessary for the debtor's support, it was held that the complaint did not state facts sufficient to constitute a cause of action. The interest of the debtor in the income of the fund under such a trust is only subject to the claims of creditors to the extent of a surplus over and above what is necessary or proper for his maintenance and support. The court cannot infer that such a surplus exists. It is the duty of the pleader to show by proper averments that such facts exist.[172]

§ 3115. Accounting.—A receiver should be ready for an accounting at any time.[173] In the settlement of the accounts of a receiver, it is not necessary for the court to make separate findings from the order approving or disapproving the account.[174] After a receiver has been appointed in an action, and he has taken possession of the property, the court is not deprived of jurisdiction to hear and settle his accounts by plaintiff's dismissing the action before issuance of summons or appearance of defendant.[175]

A receiver being the authorized officer of the court, his report of receipts and expenditures is proof of the correctness of the items set forth. Exceptions to a receiver's report on the ground that plaintiffs did not have information whereon to base a belief as to whether the items were correct or not is too indefinite to require proof of the specific items set forth.[176]

§ 3116. Compensation.—The estate may be held liable for compensation for the receiver's services, though the receivership was void;[177] but if a receiver has been reckless, and makes false charges, he will receive no compensation whatever.[178] One who has been receiver *pendente lite* is entitled to compensation from the

172 Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236.

173 Hickey v. Parrot etc. Co., 32 Mont. 143, 108 Am. St. Rep. 510, 79 Pac. 698.

174 Rochat v. Gee, 137 Cal. 497, 70 Pac. 478.

175 Pacific Bank v. Madera Fruit etc. Co., 124 Cal. 525, 57 Pac. 462.

176 Welch v. Renshaw, 14 Colo. App. 526, 59 Pac. 967.

177 Tabor v. Bank of Leadville, 35 Colo. 1, 83 Pac. 1060.

178 Dalliba v. Winschell, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

funds of the receivership.[179] The compensation allowed a receiver is proper cause for suit, and it is competent for a receiver to agree to look to the increment of the property for his compensation.[180]

The order allowing receiver's compensation may be set aside as inadvertently made.[181] The allowance of two hundred thousand dollars as receiver's fees is excessive, and acts of violence done toward the receiver do not justify that amount. The receiver is not entitled to compensation for services and expenses after he should have been discharged. No motion lies for new trial of issues in the matter of a claim for compensation and expenses of a receivership, and there can be no appeal from an order denying such a motion; but appeal does lie from a judgment allowing the compensation and expenses of a receiver.[182] A party interested, or his attorney, ought not to act as a receiver; but if such a person does act without objection, he is entitled to compensation.[183]

§ 3117. **Expenses.**—A receiver appointed to take charge of property within the jurisdiction of the court has authority to collect fees and expenses therefrom, though there may have been no necessity for the appointment.[184] A decree in a consolidated suit is not final so as to preclude subsequent judgment for expenses of the receivership in one of the original suits.[185] Expenses of a receivership being primarily allowable to the receiver, it is improper to render judgment in favor of the receiver's creditors; and where a receiver of a mining corporation had no authority to work the mines, his expenses therein could not be taxed as costs in his favor against either party to the action.[186]

Useless and extravagant expenditures should be disallowed.[187] Though a receiver is not entitled to judgment for his expenses in a suit involving right to property held by him as receiver, and such expenses should be taxed as costs, yet the irregularity in en-

179 Ford v. Gilbert, 42 Or. 528, 71 Pac. 971.

180 Ephraim v. Pacific Bank, 136 Cal. 646, 69 Pac. 436.

181 Joralmon v. McPhee, 31 Colo. 40, 76 Pac. 922.

182 Forrester v. Boston etc. Cons. etc. Min. Co., 30 Mont. 181, 76 Pac. 2.

183 Geyser Min. Co. v. Bank of Salt Lake, 16 Utah, 163, 51 Pac. 151.

184 Tobin v. Portland Flouring Mill, 41 Or. 269, 68 Pac. 749, 1108.

185 German Nat. Bank v. Best & Co., 32 Colo. 192, 75 Pac. 398.

186 Hendrie etc. Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113.

187 United States Nat. Bank v. National Bank of Guthrie, 6 Okla. 163, 51 Pac. 119.

tering such judgment will not justify reversal, where the expenses, if taxed as costs, would equal the amount of the judgment.[188]

§ 3118. **Liability of the parties for expenses.**—The plaintiff may be properly charged with the expenses of a receivership where he improperly procured it, or the funds seized were inadequate to pay the same; but creditors of the receiver cannot so charge plaintiff in the original action in which the receiver was appointed.[189] Where a receiver is legally appointed, he is entitled to compensation for his services actually rendered, and his necessary expenses, though the order of appointment be vacated or reversed; and where a receiver is improperly appointed, the party who procured his appointment is liable for his compensation, but is not liable for attorney fees incurred after the appointment has been annulled.[190] Where the appointment is revoked as erroneous, the expenses incurred during the receivership, which should be allowed, are only such as would necessarily have been incurred had there been no receiver appointed.[191]

Where all the property is taken from a receiver under a foreclosure suit, and nothing is left to compensate such receiver, he may call upon the plaintiff for such compensation, and it is not necessary that the court in its order settling the receiver's account should determine who was liable for the expenses of the receivership, since the plaintiff had already dismissed the action.[192]

§ 3119. **Attorney Fees.**—The receiver is entitled to reasonable compensation, to be fixed by order of court, for services rendered, but not for services not yet rendered.[193] The attorney for creditors is entitled to a preferred lien for the value of his services, whether the fund was recovered before or after the appointment of the receiver, and it is immaterial whether the attorney or the client presents the bill.[194] Fees of an attorney for a receiver in suit by the state are not costs within section 1038 of the California Code of Civil Procedure, so as to take from the state board

188 Antlers Land etc. Co. v. Fesler, 14 Colo. App. 201, 59 Pac. 406.

189 Hendrie etc. Mfg. Co. v. Parry, 37 Colo. 359, 86 Pac. 113.

190 Hickey v. Parrot etc. Co., 32 Mont. 143, 108 Am. St. Rep. 510, 79 Pac. 698.

191 Ogden City v. Bear Lake etc. Co., 18 Utah, 279, 55 Pac. 385.

192 Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177.

193 Riordan v. Horton, 16 Wyo. 363, 94 Pac. 448.

194 Butler v. Conwell, 14 Wyo. 166, 82 Pac. 950.

of examiners all discretion in its allowance as a claim against the state.[195] The findings of a trial court on allowances to a receiver's attorney should not be disturbed.[196]

The allowance of counsel fees on behalf of a receiver is made to the receiver, and not to the attorney, and it may not be error to refuse all attorney fees; and where the receiver's report contains an appraisement of only part of the property, it will be presumed, in fixing the receiver's compensation, that such amount was the whole of the property.[197] A receiver is not entitled to be repaid for attorney fees expended for making his report and prosecuting his own personal claims against the estate.[198] An allowance of one hundred and fifty dollars for services of a receiver's attorney may be improper.[199] Where the order appointing a receiver is void for want of jurisdiction, an order awarding attorney fees for the receiver is also void.[200]

§ 3120. **Foreign receivers.**—Where a receiver has been appointed by a state court, he has no extraterritorial jurisdiction over property, except that which is found within the state wherein he was appointed, and no transfer by the receiver of property outside of the state has any force.[201] A receiver in one state will not be allowed to sue in another state where the claim sought to be enforced conflicts with rights of citizens or creditors in the latter state.[202] A domestic attaching creditor is entitled to funds attached in California, and belonging to a non-resident corporation, as against non-resident receivers thereof appointed in another state, and the fact that other California creditors not parties to the attachment would be benefited if the receiver was awarded the funds is immaterial as against the attaching creditors.[203]

Action to cancel a mortgage to a foreign building and loan association is maintainable without the consent of the court ap-

195 Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537.

196 Kerslake v. Brower etc. Lumber Co., 40 Or. 44, 66 Pac. 437.

197 First Nat. Bank v. Oregon Paper Co., 42 Or. 398, 71 Pac. 144, 971.

198 Dalliba v. Winschell, 11 Idaho, 364, 114 Am. St. Rep. 267, 82 Pac. 107.

199 Oudin etc. v. Cole, 35 Wash. 647, 77 Pac. 1066.

200 Sullivan v. Gage, 145 Cal. 759, 79 Pac. 537.

201 Thum v. Pingree, 21 Utah, 348, 61 Pac. 18.

202 Ward v. Pacific Mut. Life Ins. Co., 135 Cal. 235, 67 Pac. 124.

203 Lackmann v. Supreme Council of Order of Chosen Friends, 142 Cal. 22, 75 Pac. 583.

pointing the receiver of the association.[204] The circuit court of the United States can appoint an ancillary receiver for an insolvent corporation in aid of a primary appointment by a state court of another state.[205]

§ 3121. **Discharge of the receiver.**—Where an order was made in a foreclosure suit confirming the receiver's report, and directing him to make certain division and payment of the money on hand and file vouchers therefor, upon which he would be discharged, the receiver is discharged by such order, though one of the parties refuses to receive his share in the settlement and does not give the receiver a voucher which he may file with the others.[206]

§ 3122. **Wrongful receivership.**—Persons who wrongfully procure a receiver for a going and solvent corporation are trespassers *ab initio*, after such appointment is declared void, and it need not be shown that the receivership was procured maliciously and without probable cause. Evidence of the loss of accounts through the statute of limitations and the opinion of the supreme court are properly admitted in an action for wrongful receivership.[207]

Where an order appointing a receiver and directing a sale of certain property was reversed on appeal, the purchaser held the property and its possession for the benefit of the owner, and the receiver held the purchase money for the benefit of the purchaser.[208] A receiver who takes control of property and funds not involved in the litigation in which he was appointed, under void orders, and those who procure the orders to be made, are trespassers and liable for the funds so taken; and they cannot excuse themselves by showing that the use they made of the same was to some extent beneficial to the wronged party.[209] If the receivership is set aside after sale, the funds are not subject to determination in litigation to which the debtor is not a party.[210]

204 Egan v. North American Sav. etc. Co., 45 Or. 131, 76 Pac. 774, 77 Pac. 392.

205 Scaife v. Scammon Inv. etc. Co., 71 Kan. 402, 80 Pac. 957.

206 Lombard v. Wade, 37 Or. 426, 61 Pac. 856.

207 Thornton-Thomas Mercantile Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10.

208 Lutey v. Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

209 Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589.

210 Lutey v. Clark, 31 Mont. 45, 77 Pac. 305, 84 Pac. 73.

FORMS IN RECEIVERSHIP.

§ 3123. Plaintiff's undertaking on ex parte application for appointment of receiver.

Form No. 812.

[TITLE.]

Whereas, the above-named plaintiff has made an *ex parte* application for the appointment of a receiver in this action; and whereas, the court upon such application has required of the plaintiff an undertaking in the sum of . . . dollars, with sureties, as provided by law:

Now, therefore, we, A. B., as principal, and G. H., farmer, of . . ., and J. K., merchant, of . . ., in said county of . . ., do hereby undertake, pursuant to the statute, in the sum of . . . dollars, that the said A. B. will pay to C. D., the defendant, all damages he may sustain by reason of the appointment of such receiver and the entry by said receiver on his duties, in case the said A. B. shall have procured such appointment wrongfully, maliciously, or without sufficient cause.

Dated . . ., 19..

G. H.
J. K.
A. B.

[Acknowledgment and justification of sureties.]

§ 3124. Notice of motion for receiver.

Form No. 813.

[TITLE.]

Take notice, that upon [here designate motion papers, e. g. thus:] the verified complaint in this action, and upon the affidavits of W. X. and Y. Z., copies of which are herewith served upon you, and upon all the papers and proceedings heretofore filed or served, the undersigned will, in the courtroom of said court, on the . . . day of . . ., 19.., at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, move the said court for the appointment of a receiver of the rents and profits of the estate of the defendant [or, of all the partnership property of A. B. and C. D., of the firm of A. B. & Co.] mentioned in the said complaint, with the usual powers and duties,

and with power to [here specify any particular power or duty specially desired in the case]; and for such other relief as may be just.

Dated . . ., 19..

L. M., Plaintiff's Attorney.

§ 3125. Order by the court appointing receiver.

Form No. 814.

[TITLE.]

Upon the summons and complaint in this action, and the affidavits of W. X. and Y. Z., and upon all the papers and proceedings heretofore filed or served herein [and on due proof of service of notice of this motion, no one appearing to oppose], and on motion of L. M., of counsel for the plaintiff, [the clause in brackets above may be omitted, if the following be added:] and after hearing N. O., of counsel for the defendant:

It is ordered, that P. Q., of . . ., counselor at law, be and hereby is appointed receiver of [designating property briefly], upon the said receiver executing, acknowledging, and filing with the clerk of this court a bond, in the usual form, to the state of California, in the penalty of . . . dollars, with two sufficient sureties, who shall justify as in cases of arrest and bail, to be approved as to its form and manner of execution by this court; and upon the due qualification of said receiver,—

It is further ordered, that he be vested with all the usual powers and rights of receivers appointed by this court, and with power to [here specify particular power to be exercised].

Dated . . ., 19..

By the court: R. S., Judge

§ 3126. Order to show cause why receiver should not be appointed.

Form No. 815.

[TITLE.]

Upon the verified complaint herein, and the affidavits of W. X. and Y. Z., copies of which are directed to be served with this order, and upon all the papers and proceedings heretofore filed or served in this action, let the defendant show cause, on the . . . day of . . . next, at . . . o'clock in the . . . noon, before this court, at the courthouse in the . . . of . . ., on that day, or as

soon thereafter as counsel can be heard, why a receiver should not be appointed of the [designate property briefly], with the usual powers and duties, and with power to [here specify any particular or unusual power desired], and why the plaintiff should not have such other relief as may be just.

Dated . . ., 19..

By the court: R. S., Judge.

§ 3127. Order appointing receiver for partnership.

Form No. 816.

[Recitals as in preceding order.]

It is ordered, that P. Q., of . . ., in . . . county, be and he is hereby appointed receiver to collect and receive the outstanding debts and moneys due to, or on account of, the partnership business of the late firm of A. B. & Co., transacting business at . . ., and also to receive and take possession of all the stock in trade, effects, and property of every nature and kind, of or belonging to the said partnership, upon his filing an undertaking executed to the state of California in the penal sum of . . . dollars, with sufficient sureties, who shall justify as in case of arrest and bail, and be approved by the court, conditioned for the faithful discharge of the duties of such receivership in the usual form.

And let the plaintiff and defendant forthwith, upon such qualification of said receiver, deliver over to him all the stock in trade, effects, and property of every kind and nature, of or belonging to said partnership, in their possession and subject to their control, or in the possession and control of either of them, and all moneys, bills of exchange, notes, drafts, checks, or other evidences of debt due or owing to said partnership, all books of account, accounts, receipts, vouchers, and papers of every nature belonging to said partnership business or pertaining thereto.

It is further ordered, that said receiver continue the business of said firm in selling for cash the stock in trade in the present course of business by retail, and as rapidly as possible, without sacrifice, to convert the said stock into money; and that, as such receiver, he have power to sue for and collect all debts or demands due said firm, and to compromise and settle the same, if in his judgment such a course be necessary or advisable, to lease any real estate of said firm for a term not exceeding one year, to finish unmanufactured stock if he deem that course

for the best interest of the parties, to sell at auction all desperate or doubtful claims, upon ten days' public notice thereof, and to [insert any other special power desired].

Dated . . ., 19..

By the court: R. S., Judge.

§ 3128. Order appointing receiver in foreclosure.

Form No. 817.

[Recitals as in preceding orders.]

It appearing satisfactorily that the mortgaged premises are inadequate security for the mortgage debt [or, is in danger of being materially injured], and that the persons personally liable therefor are insolvent:

It is ordered, that R. C., of . . ., in said county, be and he is hereby appointed receiver in this action of the rents and profits of the mortgaged premises described in the complaint, upon his filing an undertaking executed to the state of California in the penal sum of . . . dollars, with sufficient sureties, who shall justify as in case of arrest and bail, and be approved by the court, conditioned for the faithful discharge of the duties of such receiver in the usual form.

It is further ordered, that said receiver be and he is hereby empowered and directed:

1. To demand, collect, and receive all rents for said premises, or any part thereof, due and unpaid by tenants or others, or hereafter to become due;

2. To rent or lease from time to time, not exceeding . . months, any part of said premises, and to keep the buildings thereon insured and in repair, and to pay the taxes and assessments upon said premises accruing during his receivership;

3. To bring and prosecute all proper actions for the collection of rents due on said premises, as well as all necessary actions and proceedings for the removal of tenants in default, or other persons, from said premises, and to bring and prosecute all proper actions for the protection of said premises or to recover possession thereof;

4. To employ an agent to collect said rents, manage said premises, and keep the same insured and in repair, if he shall deem the same necessary, and to pay the reasonable value of said services out of the rent received.

It is further ordered, that all persons now in possession of any part of said premises, and not holding under valid leases, do forthwith surrender possession thereof to said receiver, and that all tenants in possession of such premises, and such other person or persons as may be lawfully in possession thereof, do, and they hereby are directed to, attorn as such tenant or tenants to said receiver, and, until the further order of the court, pay over to such receiver all rents of such premises now due and unpaid, or that may hereafter become due, and that all persons liable to such rents are hereby enjoined and restrained from paying any rent for such premises to the defendant, his agents, servants, or attorneys.

It is further ordered, that during the pendency of this action the defendant and his agents and attorneys be enjoined and restrained from collecting the rents of said premises, and from interfering in any manner with the property or its possession, and that the said receiver retain the moneys which may come into his hands by virtue of his said appointment, until the sale of the premises mentioned in the complaint under the judgment to be entered in this action, and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any beneficiary there may be of the said amount directed to be paid to the plaintiff in and by the said judgment, and in case there be no such deficiency, that he retain the said moneys in his hands until the further order of the court in the premises.

It is further ordered, that the said receiver and any party hereto may at any time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions, and for further power necessary to enable said receiver to properly fulfill his duties.

By the court: R. S., Judge.

§ 3129. Bond of receiver.

Form No. 818.

Know all men, that we, P. Q., principal, and G. H. and J. K., sureties, all of . . ., in . . . county, are held and firmly bound unto the state of California, in the sum of . . . dollars, to be paid to said state of California, for which payment, well and truly to be made, we, and each of us, bind ourselves jointly and

severally, and our respective heirs, executors, and administrators, firmly by these presents.

Whereas, by an order of the superior court of . . . county, made on the . . . day of . . . , 19 . . , in an action therein pending, wherein A. B. is plaintiff and C. D. is defendant, it was, among other things ordered that the above bounden P. Q. be appointed receiver of all the property, effects, and things in action of the firm of A. B. & Co., a partnership, with powers and duties set forth in said order, and that he be vested with all rights and powers as such receiver, upon filing a bond for the faithful performance of his duties, in the penal sum of . . . dollars:

Now, the condition hereof is such that if the said P. Q. shall duly account for what shall come to his hands or control as such receiver, and pay and apply the same from time to time, as he may be directed by said court, and shall obey such orders as the court may make in relation to such trust, and faithfully perform all his duties as such receiver, then this obligation to be void; otherwise, of full force and effect.

P. Q. [SEAL.]
G. H. [SEAL.]
J. K. [SEAL.]

Signed, sealed and delivered in presence of:
[JUSTIFICATION.]

§ 3130. Receiver's oath.

Form No. 819.

[TITLE.]
[VENUE.]

R. C., being duly sworn, says: That he is the person who was appointed by order of this court, dated . . . , 19 . . , receiver in the action of A. B. v. C. D., now pending in said court; and that he will faithfully discharge his trust as such receiver to the best of his ability, so help him God.

[JURAT.] R. C.

§ 3131. Notice of motion to revoke appointment of receiver.

Form No. 820.

[After recitals showing papers on which the motion is founded, and time and place of hearing, the object of the motion may be

stated thus:] That the said appointment of R. C. as receiver may be revoked; and that the court appoint a new receiver in this action, and take the requisite security.

§ 3132. Notice of motion to discharge receiver.

Form No. 821.

[The object of motion may be stated thus:] That R. C., the receiver appointed in this action be discharged; and that on an accounting by him, and a delivery of all property and other things held by him as such receiver, to be made as the court may direct, the bond entered into by him, the said receiver, and his sureties, may be vacated; [and that the plaintiff may pay him, the said receiver, the sum of . . . dollars, reported due him by the report of . . . , dated the . . . day of . . . , 19 . . , pursuant to an order made in this cause the . . . day of . . . , 19.. ; and for the costs of this motion].

§ 3133. Order revoking and appointing new receiver.

Form No. 822.

[After recitals:] That the order of this court, dated . . . , 19 . . , appointing R. C. receiver in this action, be and the same is hereby revoked and set aside; and that J. S., of . . . , be and he is hereby appointed receiver in place of said R. C., with the usual powers of receivers. [Here insert requirements as to security and statement of specific powers, as in original order.]

§ 3134. Notice of motion to instruct receiver.

Form No. 823.

[TITLE.]

Please take notice, that on the pleadings and all the papers and proceedings filed or served in this action, and on the petition of R. C. a copy of which is attached hereto [or, otherwise, describe papers on which motion is based], the undersigned, on the . . . day of . . . , 19 . . , at . . . o'clock in the . . . noon, or as soon thereafter as counsel can be heard, in the courtroom of said court, at . . . , will move the court for an order directing the receiver heretofore appointed in this action [here specify what directions are sought, e. g. thus:] to proceed in the further discharge of his trust in disposing of the partnership property

and effects; and that he be authorized and directed to sell the entire stock in trade of said copartnership at private sale, to E. F., at the sum agreed upon, to-wit, [stating terms], and take from him his indorsed notes for one half of the purchase money, payable at, etc. [or, otherwise, state the authority desired], and for such other order as may be just.

Dated . . . , 19 . . L. M., Plaintiff's Attorney.

To N. O., Defendant's Attorney.

§ 3135. Receiver's petition for leave to sell real estate.

Form No. 824.

[TITLE.]

To the . . . Court of . . . :

The petition of R. C., receiver in this cause, shows:

I. That having been appointed by order of this court on the . . . day of . . . , 19 . . , receiver of [briefly designate estate], your petitioner gave the requisite bond, with sureties, which was duly approved and filed, and he is now acting in the discharge of the said trust.

II. That it appears that the defendant is owner of certain real property known and described as follows: [Description of the premises; and state, also, what interest the defendant has in it, what incumbrances there are upon it, and its value.]

III. [State reasons for asking a sale, e. g. thus:] That your petitioner has found no goods, or chattels, or choses in action of the said C. D., out of which any money can be made by collection, suit, or sale; and the said land is the only available property.

Wherefore, your petitioner asks an order allowing him, as such receiver, to sell by public auction, and convey, all the right, title, and interest of the said C. D. of and in the said land; and that the said C. D. join in such deed if the purchaser require it; and for such other or further order as may be just.

[JURAT.] R. C., Receiver.

§ 3136. Notice of receiver's motion for instructions as to distribution.

Form No. 825.

[TITLE.]

Take notice, that upon the petition, of which a copy is attached and served upon you, I shall apply to the . . . court at . . . , on

the . . . day of . . . , 19 . . , at . . . o'clock in the . . . noon, for an order directing what course I am to take in reference to the uncollected notes and accounts, and the furniture in my possession, and also for an order directing a referee to take my accounts as receiver, and discharging me from liability, and also for an order determining your respective priorities, and my duties as to paying your various claims out of the surplus that may remain in my hands, or out of any other moneys that I may collect.

Dated . . . , 19 . .

R. C., Receiver.

To [name attorneys of all parties interested].

§ 3137. Application of receiver to pay dividend.

Form No. 826.

[TITLE.]

And now comes R. C., the receiver appointed by this court in this action, by order dated . . . , 19 . . , and respectfully shows to the court:

That the property which came to the hands of your petitioner by virtue of his receivership consisted of [here state same in general terms], and that your petitioner has realized therefrom, by means of sales thereof, up to the present time the sum of . . . dollars;

That schedule "A" attached hereto is a true list of the creditors of said [name debtor] who have come in and are entitled to share in the avails of this suit; [or, in case of a general dividend: who have come to the knowledge of your petitioner, and the amount due to each];

That while there remains part of the said property not yet collected or converted into money, the sum above mentioned is now available for dividend.

Your petitioner prays that he be ordered to make a dividend among such creditors as are entitled to share therein, [and that he be authorized to notify them to make proof of their claims].

[This last clause to be added if the dividend is to be generally among all the creditors.]

[VERIFICATION.] R. C., Receiver.

§ 3138. Affidavit to receiver's account.

Form No. 827.

[VENUE.]

R. C., being first duly sworn, says: That he is the receiver who makes the within and foregoing account; that said account is true and correct, according to the best of his knowledge and belief; that it contains a full and correct statement of all moneys and property which came to his possession or control as such receiver, and of all moneys paid out by him, together with his vouchers therefor

[JURAT.] R. C.

§ 3139. Complaint by receiver appointed pending litigation.

Form No. 828.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [State cause of action.]

II. That on the . . . day of . . . , 19 . . , at the city and county of San Francisco, and state of California, in an action then pending in the superior court of the county of . . . , state of . . . , wherein C. D. was plaintiff and E. F. was defendant, upon an application made by the said A. B., and by order duly made by said court [or, judge], this plaintiff was appointed receiver of the property of the said C. D., hereinafter described, to-wit: [Describe property so as to show that the cause of action is embraced.]

III. That thereafter, and before the commencement of the present action, he gave his bond required by the said order, as such receiver, approved by the said judge, which bond, with such approval, is on file in the said court, and was so filed prior to the commencement of this action.

IV. That on the . . . day of . . . , 19 . . , said receiver duly obtained leave of the said court [the court appointing him] to bring this action.

[DEMAND OF JUDGMENT.]

§ 3140. Motion for appointment of receiver.

Form No. 829.

[TITLE.]

Plaintiff moves that a receiver be appointed in this action on the following grounds: [State them.] [SIGNATURE.]

§ 3141. Complaint—In supplementary proceedings.

Form No. 830.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. [State cause of action.]

II. That on the . . . day of . . ., 19. . , at . . ., upon an application made by L. M., a judgment creditor of said C. D., in proceedings supplementary to execution, and by an order or determination then duly made by the Hon. G. H., judge of the superior court for the county of . . ., state of . . ., the plaintiff was appointed receiver of the property of said C. D.

III. That thereafter, and before the commencement of this action, he gave his bond, required by said order, etc., [as in preceding form].

IV. [Allege permission to sue as in preceding form.]

[DEMAND OF JUDGMENT.]

§ 3142. Complaint—Setting out proceedings at length.

Form No. 831.

[TITLE.]

The plaintiff, as receiver of the property of C. D., complains, and alleges:

I. That E. F. and G. H., of San Francisco, state of California, survivors of C. D., deceased, in an action brought by them in the superior court of the county of . . ., state of California, against J. K., obtained judgment against the defendant in that action, on [etc.], for the sum of [etc.], which judgment was entered by the clerk of the county of . . ., on the day aforesaid, and the roll filed and judgment docketed in said clerk's office on that day.

II. That on [etc.], an execution therefor was duly issued and delivered to the sheriff of said county of . . ., commanding him to make said [etc.], with interest from [etc.], and make return of his doings in the premises; that said sheriff afterward, and on [etc.], returned said execution to the office of the clerk of the county of . . ., with his return thereon indorsed, showing the execution wholly unsatisfied.

III. That afterwards, and on [etc.], the plaintiff in said action caused an affidavit to be made, setting forth the above facts, as

to obtaining said judgment, the filing of transcript, the issuing and return of said execution, and that the said judgment remained wholly unsatisfied, and presented the same to Hon. J. D., judge of the superior court of the county of . . ., on the same day, who thereupon, and on [etc.], made an order requiring said judgment debtor to appear before L. M., Esq., referee thereby appointed, at the office of said L. M., Esq., in [etc.] on [etc.], at . . . o'clock in the . . . noon, to testify concerning his property; and said N. O. by said order was further forbidden to transfer, or in any manner dispose of or interfere with, any property, moneys, or things in action belonging to him until further order in the premises.

IV. That said order was personally served on said defendant on the same day, and said defendant appeared before said referee at the time and place in said order specified, and severally submitted to an examination under oath, and testified as to his property, which examination was on the same day, by said referee, certified to said judge, who thereupon, by an order, appointed A. B., of [etc.], this plaintiff, receiver of all the debts, property, effects, equitable interests, and things in action of said C. D., and further ordered this plaintiff, before entering upon the execution of his trust, to execute to the clerk of this court a bond, with sufficient sureties, to be by said judge approved, in the penal sum of . . . dollars, conditioned for the faithful performance and discharge of the duties of such trust; and that this plaintiff, upon filing such bond in the office of the clerk of the county of . . ., be invested with all rights and powers as receiver according to law. The said C. D. was therein and thereby enjoined and restrained from making any disposition of, or interfering with, his property, equitable interests, things in action, or any of them, except in obedience to said order, until further order in the premises.

V. That on [etc.], he executed a bond with sureties, as required by said order and the rules and practice of this court, which was approved by said judge, and filed in the office of the clerk of the county of [etc.].

VI. [Allege cause of action.]

[DEMAND OF JUDGMENT.]

§ 3143. Complaint—By receiver of dissolved corporation.

Form No. 832.

[TITLE.]

The plaintiff, as receiver of the . . . company, complains, and alleges:

I. [State cause of action accruing to the corporation.]

II. That on the . . . day of . . ., 19.., at . . ., upon an application made upon occasion of the insolvency of the said . . . company [or state any other reason which may exist], and by an order of the Hon. A. B., judge of the superior court of the county of . . ., state of California, the plaintiff was appointed receiver of the property, effects, and things in action of the said . . . company, pursuant to statute.

III. [Allege qualification and permission to sue.]

[DEMAND OF JUDGMENT.]

§ 3144. Complaint—By receiver of mutual insurance company on premium note.

Form No. 833.

[TITLE.]

The plaintiff, as receiver of the . . . company, complains, and alleges:

I. That the . . . insurance company was at the time hereinafter mentioned a mutual insurance company, duly incorporated as such under and by virtue of an act of the legislature of this state, entitled [title of act], and was duly organized under said act, to make [etc.]. [State object of incorporation.]

II. That on the . . . day of . . ., 19.., at the general term of the superior court, in and for the county of . . ., state of California, this plaintiff was appointed receiver of the stock, property, things in action, and effects of the said company [upon the occasion of its voluntary dissolution, or otherwise].

III. That thereafter, and prior to the . . . day of . . ., 19.., the plaintiff gave the requisite security as said receiver, and filed the same in the clerk's office of the said county of . . ., and thereupon entered upon the duties of his office as such receiver, and is now, as said receiver, in possession of the stock, property, things in action, and effects of the said corporation.

IV. That the defendant made his certain note in writing, commonly called a premium note, and, at the date in said note men-

tioned, delivered the said note, of which the following is a copy, to the said . . . company. [Copy note.]

V. That said policy of insurance expired in one year from the date thereof, and said note formed part of the capital stock of said company, and which said policy of insurance was issued and delivered to the said defendant at the date mentioned in the said note, and thereby the said defendant became a member of said company, down to and including the time for which said note was assessed by said plaintiff as said receiver, to pay the losses and liabilities of said company incurred whilst said policy and note were in full force and effect.

VI. That after he had entered on the duties as said receiver, he ascertained the amount of the losses by risks and other liabilities of said company, and, as said receiver, at . . ., aforesaid, on the . . . day of . . ., 19.., did settle and determine the sums to be paid by the several members of said company, as their respective portions of such losses and liabilities, in proportion to the unpaid amount of his or their deposit note or notes, agreeably to the charter and by-laws of said company, and did thereafter, on said notes, assess the sum so settled and determined upon to be paid by the several members of said company liable to be assessed therefor.

VII. That after the making of the said assessment, as said receiver, he published notice thereof in the . . ., a newspaper published in the county of . . ., once in each week for . . . days, commencing on the . . . day of . . ., 19.. ; and that previous to the . . . day of . . ., 19.., he caused notice to be served on each person assessed of the amount so settled, determined, and assessed to be paid by him on his premium note, by depositing such notice in the post-office at . . ., directed to each person assessed at his place of residence, as far as such place of residence could be ascertained from the books of said company, requiring said assessment to be paid in . . . days after service of such notice.

VIII. That at a term of the superior court of the county of . . ., held at the courthouse in the city and county of San Francisco, on the . . . day of . . ., 19.., the aforesaid assessment, so made by said receiver on the premium notes of the members of said company, was ratified and confirmed, and the said receiver was authorized and directed by said court to bring suits against the several members of said company who have

refused or neglected to make payment of the amount so assessed by plaintiff to be paid on their respective premium notes.

IX. That the said defendant's note aforesaid was assessed for the purpose aforesaid, to the amount of . . . dollars, and said assessment was made for losses or damages by risks on life [or otherwise] and expenses accrued to said company only while said note and policy of insurance therein mentioned were in full force and effect.

X. That the defendant has not paid the said assessment, or any part thereof.

[DEMAND OF JUDGMENT.]

CHAPTER XC.

DEPOSIT IN COURT.

§ 3145. Deposit in general.—Deposit in court may be made in the following cases, under the code: 1. In arrest and bail, the defendant at any time before execution shall be discharged from arrest upon depositing the amount mentioned in the order of arrest,[1] or he may at the time of the arrest deposit the amount in the hands of the sheriff; or if the bail be reduced, may deposit the reduced amount instead of giving bail, and shall receive from the sheriff a certificate of the deposit made, and he shall be discharged from custody.[2] The sheriff shall then deposit the money in court, giving a certificate to each of the parties.[3] Deposit in court may be made—2. In actions for the foreclosure of mortgages, after the sale of the property, if there be surplus money after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the persons entitled to it, and in the mean time may direct it to be deposited in court.[4] Deposit in court may be made—3. In actions against steamers, boats, and vessels, after the satisfaction of the execution by the application of the proceeds of sale—1. To the payment of the amount of claims filed; and 2. To the payment of the judgment and costs and sheriff's fees; if no appearance by the owner, master, or consignee has been made in the action, the court shall direct a deposit of the balance in court.[5] Deposit in court may be made—4. In appeal, to render the appeal effectual for any purpose, appellant shall file an undertaking in the amount required by law, or such amount may be deposited in court in lieu thereof.[6] 5. A defendant, against whom an action is pending upon a contract or for specific personal property, at any time before answer, upon

1 Cal. Code Civ. Proc., § 486.

2 Cal Code Civ. Proc., § 497.

3 Cal. Code Civ. Proc., § 498. As to disposition of money on recovery of judgment, see Cal. Code Civ. Proc., § 500.

4 Cal. Code Civ. Proc., § 727.

5 Cal. Code Civ. Proc., § 825.

6 Cal. Code Civ. Proc., § 941. That such deposit will be effectual as a stay of proceedings in the court below upon the judgment or order appealed from except in the cases provided for in sections 942, 943, 944, and 945, see Cal. Code Civ. Proc., § 949.

affidavit that a person, not a party to the action, makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, may apply to the court to substitute such third person in his place and discharge him from liability to either party, on his depositing in court the amount claimed on such contract, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make an order substituting a person in the place of the defendant, on the latter depositing in the court the amount claimed on the contract.[7] So a tenant may offer to pay the rents into court to abide the ultimate decision of the case.[8] There are many cases occurring in practice where the court, in the exercise of its equity powers, may order the fund which is the subject of the litigation to be paid into court to abide the result of the suit, as well as special sums for purposes incident to the action.

Where, in an action to set aside a deed, the plaintiff offers to pay the money into court whenever the court shall order a reconveyance, and the defendant rejects the offer, it is error to require the plaintiff to pay the money into court as a condition precedent to his right to continue the action.[9]

§ 3146. **Deposit, how made.**—When it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.[10] The deposit must be delivered to the clerk in person, or to a deputy authorized by his appointment in writing to receive the same, and the clerk, unless otherwise directed by law, must deposit the same with the county treasurer, to be held subject to the order of the court. The appointment of the clerk to receive such money must be filed with

7 Cal. Code Civ. Proc., § 386.
8 McDevitt v. Sullivan, 8 Cal. 592.
9 Green v. Duvergey, 146 Cal. 379, 80 Pac. 234.
10 Cal. Code Civ. Proc., § 572.

the county treasurer.[11] Violation of orders of the court directing a deposit may be punished as contempt, and the sheriff be ordered to enforce the order of deposit.[12]

§ 3147. Order to deposit money in court.

Form No. 834.

[VENUE.]

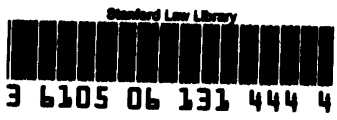
It being admitted by the [answer] of defendant [or, intervener; or, shown by testimony of defendant], that he has in his possession [or, under his control], certain money amounting to . . . dollars [or, personal property, capable of delivery], which is the subject of controversy herein [or, which is due to plaintiff], upon the motion of . . . , attorney for . . . :

It is hereby ordered, that said . . ., defendant [or, intervener, or other party], deposit said money [or, property] with the clerk of this said court, not later than the . . . day of . . ., 19.., to be by him held subject to the further direction of the court.

Done this . . . day of . . ., 19..

A. B., Judge of said Court.

11 Cal. Code Civ. Proc., § 573. 12 Cal. Code Civ. Proc., § 574.



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